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IN THE

Supreme Court of The United States

OCTOBER TERM, 1983

No. 83-.....

IGNACIO DeLEON MARTINEZ,
JESUS CHAVARRIA GARCIA,

Petitioners,

v.

UNITED STATES ATTORNEY GENERAL
WILLIAM FRENCH SMITH ET AL
UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit exceeded its appellate jurisdiction under 28 U.S.C. § 1291 in deciding disputed questions of fact and law as to the status of the Petitioners as fugitives from justice and concurrently dismissing the Petitioners' appeals on the grounds that the Petitioners were fugitives from justice within the contemplation of *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970)?

2. Whether the Fifth Amendment due process and Sixth Amendment trial and confrontation rights of the Petitioners were violated when the Fifth Circuit dismissed the Petitioners' appeals under the rationale of *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) without a hearing on the issue as to whether the Petitioners were fugitives from justice?

3. Whether the Fifth Circuit's dismissal upon motion by the United States of the Petitioners' appeals under the rationale of *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970), violated the principles of an equitable and just disposition of issues mandated by *Krippendorf* v. *Hyde*, 110 U.S. 276 (1884) and *Precision Instrument Mfg. Co.* v. *Automatic Machine Co.*, 324 U.S. 806 (1945), when the dismissal of the Petitioners' appeals, involving a challenge to the United States' constitutionally impermissive description of the Petitioners in accusatory pleadings in criminal cases as unindicted/uncharged participants in a bribery scheme, allowed the wrongdoings of the United States to remain unredressed and unpunished?

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IN THE

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OCTOBER TERM, 1983

No. 83-.....

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JESUS CHAVARRIA GARCIA,

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UNITED STATES ATTORNEY GENERAL
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UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari be issued to review the order dismissing the Petitioners' consolidated appeals[1] to the United States Court of Appeals for the Fifth Circuit entered in such proceedings on June 16, 1983.

[1] The parties and the style of the cases on consolidated appeal to the Fifth Circuit are shown below:

No. 83-2007

IGNACIO DELEON MARTINEZ, *Applicant-Appellant*
JESUS CHAVARRIA, *Applicant-Appellant*
CRAWFORD ENTERPRISES, INC., *Defendants*

v.

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

JURISDICTION

An opinion was not rendered by the United States Court of Appeals for the Fifth Circuit in respect to the dismissal of the consolidated appeals. A copy of the Order Dismissing the Appeals and the Order Denying the Petition for Rehearing and Denying the Suggestion for Rehearing En Banc is found in the Appendix at pages 24 through 26.

The order dismissing the Petitioners' appeals was entered on June 16, 1983. A timely motion for Panel Reconsideration and a timely Suggestion for Rehearing En Banc were denied on August 22, 1983. The Petition for a Writ of Certiorari has been filed within 90 days plus the one day Sunday enlargement, as provided by 28 U.S.C. § 2101(c).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

No. 83-2008

IGNACIO DELEON MARTINEZ AND
JESUS CHAVARRIA, *Applicants-Appellants*
RUSTON GAS TURBINES, INC., *Defendant*

v.

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

No. 83-2045

IGNACIO DELEON MARTINEZ, *Plaintiff-Appellant*
JESUS CHAVARRIA, *Intervenor-Appellant*

v.

WILLIAM FRENCH SMITH, RUDOLPH W. GIULIANI,
KENNETH A. CARUSO, D. LOWELL JENSEN, ROBERT W. OGREN,
ROGER M. OLSEN, WILLIAM F. PENDERGAST,
BARBARA E. NICASTRO, *Defendants-Appellees*

No. 83-2060

IGNACIO DELEON MARTINEZ, AND
JESUS CHAVARRIA, *Applicants-Appellants*
INTERNATIONAL HARVESTER COMPANY, *Defendant*

v.

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

The Petitioners were parties in each of the four cases on appeal to the United States Court of Appeals for the Fifth Circuit. Each of the actions undertaken by the Petitioners in the District Court were civil in nature, for the Petitioners had not been charged with the commission of any crime. The primary issue in each of the cases on appeal involved the question whether the Petitioners as unindicted/uncharged persons named as participants in an alleged bribery scheme could have their names and identification by job title expunged from the:

1) Indictment filed in *United States of America* v. *Crawford Enterprises, et al* Cr. No. H-82-224 (S.D. Tex) — hereinafter referred to as the *"Crawford"* case;

2) Information and offer of proof filed in *United States of America* v. *Ruston Gas Turbines, Inc.*, Cr. No. H-82-207 (S.D. Tex); and

3) Information and offer of proof filed in *United States of America* v. *International Harvester Company*, Cr. No. H-82-244, (S.D. Tex.) hereinafter referred to as the *"Harvester"* case;

The expungement application in the *Crawford* case had been preceded by an injunction/declaratory judgment action filed on October 21, 1982 by Petitioner Ignacio DeLeon Martinez ("DeLeon") in the civil docket of the District Court for the Southern District of Texas under the style *Ignacio DeLeon Martinez* v. *United States, Attorney General William French Smith, et al*, Civ. No. H-82-3090. The expungement application in the *Harvester* case had been preceded by the simultaneous filing by DeLeon and the Petitioner Jesus Chavarria Garcia ("Chavarria") of an amended injunction/declaratory judgment action on November 18, 1982 in Civil No. H-82-3090 accompanied by Chavarria's Motion to Intervene and an injunction/declaratory judgment action in the *Harvester* case that paralleled the amended pleading filed in Civil No. H-82-3090.

The Trial Court in CR. No. H-82-3090 entered the following orders:

(1) October 27, 1982 — an order expunging DeLeon's name from the indictment in the *Crawford* case;

(2) October 29, 1982 — an order denying DeLeon's motion to expunge job title identifications of him from the indictment in the *Crawford* case;

(3) November 18, 1982 — an order denying Chavarria's motion to intervene and stating that no additional relief will be granted in this action.

The Trial Court in the *Harvester* case entered its order on December 1, 1982:

(1) Denying the Application of DeLeon and Chavarria to expunge from the Information filed November 17, 1982 references to and identifications by positions of DeLeon and Chavarria.

(2) Granted the Application of DeLeon and Chavarria to order the U.S. Attorney and Department of Justice Trial Attorneys not to include in the Offer of Proof filed in the case on November 18, 1982 any reference to and identification of DeLeon and Chavarria by position or otherwise.

If it is determined that the appeals to the Fifth Circuit are classifiable as criminal matters because they arose in connection with criminal proceedings against parties other than the Petitioners, the Petitioners have respectfully invoked the extension provisions of Rule 20.1 and applied for a 30 day extension for applying for a writ of certiorari.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This case involves:

1) U.S. CONST. art. III, §§ 1, 2
2) U.S. CONST. amend. V
3) U.S. CONST. amend. VI
4) 28 U.S.C. and § 1254(1)
5) 28 U.S.C. § 1291
6) 28 U.S.C. § 2201
7) Title 9 of the UNITED STATES ATTORNEY'S MANUAL, § 9-11.225.

The foregoing provisions are set forth verbatim in the Appendix.

STATEMENT OF THE CASE

In the period from September 17, 1982, through November 17, 1982, in a Foreign Corrupt Practices Act ("FCPA") proceeding in California and three FCPA proceedings in Houston, Texas, in which proceedings the Petitioners were neither indicted nor charged, the Petitioners were alleged to be the intended or actual recipients of bribes totalling $9,960,432.40 in a bribery scheme allegedly developed by gas compression equipment suppliers to Petroleos Mexicanos ("Pemex"). The Petitioners were identified in the four sets of accusatory pleadings numerous times; that is, DeLeon was identified by surname 17 times, described as the Pemex official in charge of purchasing 9 times, described 10 times as "folks," a code word allegedly identifying DeLeon and Chavarria, and had 37 surname identifications of him deleted from the indictment in the *Crawford* case; and Chavarria was identified by surname 59 times, described as the Pemex official in charge of production/exploration 13 times and described 6 times by the code word "folks."

DeLeon at first, and later Chavarria, through their attorneys in oral discussions with U.S. Trial Attorneys Pendergast and

Nicastro, in an office conference with Deputy Assistant Attorney General Roger M. Olsen, and in letters to U.S. Trial Attorney Pendergast and Attorney General William French Smith unsuccessfully sought a mutual accommodation whereby the United States would cease its practice of describing DeLeon and Chavarria as participants in an alleged bribery scheme and agree to a procedure whereby prior allegations about their participation in the alleged bribery scheme would be deleted from the accusatory pleadings by the filing of mutually approved pleadings.

The Petitioners initiated two injunction/declaratory judgment actions and four expungement actions in connection with the three FCPA criminal cases filed in Texas. Partial relief was granted to the Petitioners in the injunction actions: the Trial Court in DeLeon's first injunction/declaratory judgment case ruled that the California FCPA case and the first Texas FCPA case resulted in damaging publicity in Mexico to DeLeon as a result of the extensive media coverage, which was evidenced by over 3,000 newspaper, television and radio reports about the Petitioners, so that DeLeon's name should be expunged from the indictment in the second Texas FCPA case; the Trial Court in the third Texas FCPA case ruled that the job description identifications of the Petitioners in an offer of proof must be deleted, but that the job description identifications of the Petitioners could remain in the information for the reason that the information had been filed the day before the Petitioners instituted their injunction/declaratory judgment action to expunge the references. All relief was denied to the Petitioners in the expungement cases, notwithstanding the fact that partial expungement relief had been given to DeLeon in the *Crawford* case and to both Petitioners in the *Harvester* case.

The Petitioners perfected timely appeals from the adverse decisions in the expungement actions, which appeals were consolidated by the Fifth Circuit for hearing and briefing purposes.

The Petitioners timely filed their required brief, alleging 28 U.S.C. § 1291 (Supp. 1983), as appropriate jurisdictional grounds.

On March 29, 1983, the due date of its Reply Brief, the United States filed in the Fifth Circuit a Motion to Dismiss the Appeals ("Dismissal Motion") on the ground that the Petitioners were fugitives from justice. The United States' allegations in support of the Dismissal Motion were that: 1) Mexico indicted the Petitioners for fraud and illegal association on March 9, 1983; 2) an Extradition Complaint was filed on behalf of Mexico in the U. S. District Court for the Southern District of Texas on March 25, 1983, and provisional extradition arrest warrants were issued for the Petitioners on March 25, 1983, which arrest warrants could not be executed because the Petitioners allegedly "had fled" from Sugarland, Texas.

An affidavit signed by U.S. Trial Attorney Pendergast that was attached to the Dismissal Motion stated, without any supporting proof, that (a) during the week of March 21, 1983, DeLeon and Chavarria were located in Sugarland, Texas, and (b) had fled from their residences in Sugarland, Texas on or before March 25, 1983.

DeLeon and Chavarria each owned townhomes in Sugarland, Texas, which from time to time, they or members of their family used. DeLeon's passport shows that he entered the United States from Mexico on January 8, 1983 and left the United States and entered Windsor, Canada, on March 4, 1983, and has been outside the territorial boundaries of the United States and Mexico since that date. Chavarria left Mexico and visited the United States briefly in the midpart of 1982 and then left the United States. Chavarria has not been within the territorial boundaries of the United States or Mexico since mid-summer 1982.

DeLeon did not personally occupy his Sugarland townhome after March 3, 1983. Chavarria did not occupy his Sugarland townhome after midsummer 1982, which fact was supported in

affidavits signed by Estaban Chavarria who resides in an adjacent townhome in Sugarland, Texas.

In an affidavit of Fort Bend County Deputy Terry Morgan ("Morgan") mailed to the Fifth Circuit by the United States on August 12, 1983, the United States contended that Morgan saw DeLeon on March 8, 1983 and March 24, 1983. The affidavit of Deputy Morgan did not reveal that his affidavit, in respect to the March 8, 1983 meeting, was not based upon his own independent recollection, but was based upon a recollection derived from the examination of residential security records maintained by the Homeowners Association of the subdivision in which DeLeon's home was located, which records were neither referred to nor attached to Morgan's affidavit. Access to and examination of the foregoing residential security records without a subpoena duces tecum was denied DeLeon's attorney by Fort Bend County Deputy Constable Hughes ("Hughes"), in his capacity as the Chief of Security for the Homeowner's Association. Hughes indicated that he would submit a report to U.S. Trial Attorney Pendergast and seek Pendergast's approval for DeLeon's attorney to examine the records.

The record pertaining to the extradition action against the Petitioners in the Clerk's office of the U.S. District Court for the Southern District of Texas on March 28, 1983 and at all times since March 28, 1983 contained no proof that an indictment of the Petitioners was issued in Mexico at any time. The United States did not comply with its representations to the U. S. District Court that Mexico would make a diplomatic request for the arrest of the Petitioners in conformity with the treaty and the formal papers upon which the demand for extradition was founded within 60 days.

The Dismissal Motion was granted by the Fifth Circuit, on June 16, 1983, and the Petitioners' Motions for Panel Reconsideration and Suggestion of En Banc Reconsideration of the Dismissal Order were denied on August 22, 1983.

The Petitioners' injunction/declaratory judgment actions and expungement actions were based upon the decisions in the Fifth and Ninth Circuits holding that it was a constitutionally impermissive denial of liberty and property rights guaranteed by the Fifth Amendment to the Constitution of the United States, for the United States in accusatory pleadings filed in a criminal case to name or identify a person as an unindicted co-conspirator. *United States* v. *Briggs*, 514 F.2d 450 (9th Cir. 1975); *In re Smith*, 656 F.2d 1011 (5th Cir. 1981); *United States* v. *Chadwick*, 556 F.2d 450 (9th Cir. 1977); *Application of Jordan*, 493 F.Supp. 199 (S.D.W.Va. 1977), U.S. Attorney's Manual § 9. 11-225; The expungement actions also raised the issue that the description by the United States of the Petitioners in the accusatory pleadings as intended or actual recipients of bribes totalling $9,960,432.40 constituted prosecutorial misconduct.

Department of Justice trial attorneys checked with Mexican authorities before including the names of the Petitioners in the accusatory pleadings involved in the appeals. In October, 1982 U. S. Trial Attorney William Pendergast stated that although the Petitioners could not be indicted or charged in the accusatory pleadings, the Petitioners should be punished by describing them in the accusatory pleadings involved in these cases. On May 23, 1983, U.S. trial attorneys in a hearing before Judge Cire in the lead *Crawford* case admitted that the Government did not ***have*** actual proof of monies being paid to Pemex officials, but that the Government ***felt*** that it now had proof that money ended up in a bank account of one of the Pemex officials described in the *Crawford* indictment.

REASONS FOR GRANTING THE WRIT

Review on Certiorari is merited under Rule 17.1 of the Rules of the Supreme Court. There is a constant need for this Court to review and to supervise situations where the United States and its agents intentionally and consciously violate a person's Fifth Amendment due process rights and Sixth Amendment trial and

confrontation rights. The ongoing identification of the Petitioners by surname and job title description and then only by job identification as unindicted/uncharged participants in a bribery scheme indicates a clear need for this Court to monitor legal positions that can and do oppress persons like the Petitioners. The granting by the trial courts of partial and inadequate protection for the Petitioners' constitutional rights must be supervised. The Fifth Circuit's apparent extension of its appellate jurisdiction under 28 U.S.C. § 1291 to the resolution of disputed questions of fact and law as to the status of the Petitioners as fugitives from justice needs to be contained or forcefully redirected. The Fifth Circuit, by granting the United States' Motion to Dismiss the Petitioners' appeals, has impermissibly extended its supervisory rights under Article III of the Constitution with a resultant interference with the Petitioners' Fifth and Sixth Amendment rights. The Fifth Circuit has ignored its obligations under Article III to assure fair and equitable conduct by all parties before it. If the *Molinaro* rule requires the dismissal of the Petitioners appeals, *Krippendorf* v. *Hyde*, 110 U.S. 276 (1884), *Precision Investment Mfg. Co.* v. *Automatic Machine Co.*, 324 U.S. 806 (1945), and *Keystone Driller Co.* v. *General Excavator Co.*, 290 U.S. 240 (1933), require that indignities heaped upon the Petitioners through the intentional and conscious actions of the United States be redressed and remedied in a way that is just and equitable.

ARGUMENT

I.

The Fifth Circuit does not have the jurisdiction under 28 U.S.C. § 1291 to consider disputed questions as to whether the Petitioners were fugitives from justice within the meaning of *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970), when the questions are first raised while the cases on appeal are pending before the Fifth Circuit.

The jurisdiction of the Fifth Circuit is limited by Section 1291 of Title 28 of the U.S. Code to a consideration of appeals from final decisions of district courts of the United States.

The final decisions of the District Courts that were on appeal to the Fifth Circuit involved appeals from orders denying the Petitioners' applications to expunge references to them as unindicted/uncharged participants in an alleged bribery scheme and the Petitioner Chavarria's appeal from an order denying him the right to intervene in an injunction/declaratory judgment proceeding initiated by the Petitioner DeLeon prior to the presentation and filing of the indictment in the Crawford case.

The Dismissal Motion filed by the United States with the Fifth Circuit raised for the first time on appeal the question whether the Petitioners were fugitives from justice within the contemplation of the *Molinaro* rule. The Petitioners denied the allegations as to their status as fugitives.

The Fifth Circuit had jurisdiction to hear the appeals, but it did not have jurisdiction to consider and decide the disputed questions of fact and law as to the status of the Petitioners as fugitives from provisional extradition arrest warrants or as fugitives from crimes in Mexico for two reasons: (1) these questions had not been the subject of final decisions by District Courts, and (2) a Court of Appeals cannot take judicial notice of matters not included in the record of the case in which a final decision has been entered. In particular it cannot take judicial notice

of unrecorded legal proceedings in foreign forums, which were not offered into evidence, for example, a Mexican indictment of the Petitioners, a Mexican arrest warrant, a Mexican extradition request, an affidavit of U.S. Trial Attorney Pendergast based upon hearsay information provided him. *United States* v. *Martin*, 273 F.2d 344 (2nd Cir. 1959).

After the Dismissal Motion was filed, the record before the Fifth Circuit was: (1) the records brought forward from the District Court proceedings; (2) the Dismissal Motion supported by copies of the extradition complaint filed by the United States, provisional extradition arrest warrants, and U. S. Trial Attorney Pendergast's affidavit based upon *information provided him* that the Petitioners had been in their Sugarland, Texas, townhomes in the week of March 21, 1983, and fled from those homes on or before March 25, 1983; (3) copies of pages from DeLeon's passport showing his entry into the United States on January 8, 1983, and departure from the United States and entry into Windsor, Canada on March 4, 1983; and (4) the affidavits of Estaban Chavarria, the son of the Petitioner Chavarria, that his father had not been in the United States or Mexico at any time after mid-summer 1982.

It is clear that the issue as to the fugitive status of the Petitioners was a disputed one and did not represent a final decision of a District Court.

The normal procedure for resolution of a disputed question such as the Petitioners' status as fugitives from justice would be to remand the cases to one of the District Courts, whose orders were the subject of the appeals, for a decision as to the Petitioners' status, i.e., were the Petitioners fugitives from justice? *Ruetz* v. *Lash*, 500 F. 2d 1225 (5th Cir. 1974); *United States* v. *First National City Bank*, 568 F. 2d 853 (2nd Cir. 1977); *United States* v. *Press*, 401 F. 2d 499 (3rd Cir. 1968).

The definition of a fugitive from justice is not a static one. As pointed out in *Donnell* v. *United States*, 229 F.2d 560 (5th Cir.

1956), the definition of a "fugitive from justice" in an extradition context is different from the definition in a limitations context:

> It is clear, therefore, that under extradition statutes the fact of absence at the time of the arrest is sought establishes the right of removal to the district of the crime regardless of the motive or intent behind the absence. But it is equally clear that, in determining whether a person charged with crime will be denied the right to be protected by the statute of limitations, the purpose and intent of his absence is an important matter to be inquired into by the jury under the plain words of the statute and the decision discussed.
>
> The Court below having held that appellant's absence standing alone took from him the right to have the jury consider the circumstances and intent attending his absence, its judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Id. at 565.

There was a clear conflict as to the legal significance of the Petitioners, as Mexican citizens, not being found on March 25, 1983 in townhomes owned by them in Sugarland, Texas. In view of the foregoing conflict as to the fundamental facts and the applicable law, the Fifth Circuit in the light of the limitations on its jurisdiction should have followed the principles set forth in the *Ruetz, City Bank, Press* and *Donnell* cases and directed one of the District Courts to conduct a hearing in respect to the question as to whether DeLeon or Chavarria was a fugitive from justice. The failure of the Fifth Circuit to follow such a procedure caused it to exceed its jurisdiction when it dismissed the Petitioners' appeals.

II

The Fifth Circuit's finding without a hearing that the Petitioners were fugitives from justice followed by the dismissal of their appeals violated the Petitioners' Fifth and Sixth Amendment rights just as effectively as the United States description of them,

as unindicted and uncharged participants in a bribery scheme, violated their constitutional rights.

1. *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) reflects a principle of even-handed administration of the judicial process and is not a limitation upon the Petitioners' rights under the Fifth and Sixth Amendments.

By their terms, Article III of the Constitution and the Fifth and Sixth Amendments are co-extensive in their application to the Petitioners. The appeals before the Fifth Circuit of the denials of the Petitioners' expungement applications were adjudicable cases or controversies. The issue as to whether the Petitioners were fugitives from justice within the meaning of the *Molinaro* case was before the Fifth Circuit, but the disputed issue could only be resolved by a trial court having jurisdiction to find facts and determine the applicable law. The Fifth Circuit lacked such jurisdiction.

It is clear that the District Court cases involved the rights of the Petitioners under the Fifth and Sixth Amendments. The filing by an unindicted person of an expungement application in a criminal case bifurcates the case into one having civil and criminal aspects. The interjection of a question as to the status of the Petitioners as fugitives from justice in an expungement case that is being appealed raises questions that might impact upon the Petitioners' rights. If the issue of the Petitioners' status is resolved on the grounds that they are criminals, the Petitioners would clearly have protectible Sixth Amendment rights at both the trial court level and the appellate level if the appellate court is sitting as a court of original jurisdiction.

Even if the Fifth Circuit's lack of jurisdiction to make a decision as to the status of the Petitioners is ignored, the fact remains that the Fifth Circuit's determination without a hearing that the Petitioners were fugitives from justice and concurrent

dismissal of the appeals violated the Petitioners' Fifth Amendment due process and Sixth Amendment trial and confrontation rights.

2. The issue as to whether the appeals involved Petitioners who were not within the Fifth Circuit's control was not relevant to the question of whether the District Courts' denials of expungement relief were wrong and should be reversed.

Disentitlement to consideration of an appeal, under the *Molinaro* rule, rests upon the proposition that an Appellant who had fled during the pendency of the appeal of his criminal conviction, has removed himself from the jurisdiction and control of the appellate court and rendered the issues before the Court moot. *Smith* v. *United States*, 94 U.S. 97 (1876); *Bohanan* v. *Nebraska*, 125 U.S. 692 (1887); *Molinaro*, 396 U.S. at 366; *United States* v. *Dimas Campos-Serrano*, 404 U.S. 293 (1971); *Allen* v. *State of Georgia*, 166 U.S. 950 (1897).

The Petitioners were not defendants in any criminal actions, but were civil litigants taking appropriate legal steps to protect their constitutional rights after the United States had violated them. The Petitioners' appeals challenged the United States' actions in depriving the Petitioners of their liberty and property rights. The corrections of the injustices caused the Petitioners by the United States did not involve or require control of the persons of the Petitioners. Full effect could be given to a Fifth Circuit decision on the merits of the Petitioners' expungement applications without ever involving the Petitioners or requiring the Petitioners to do anything. The civil issue as to the entitlement of the Petitioners to have the Fifth Circuit consider their appeal should not hinge upon whether the Petitioners were physically within the jurisdiction of the Fifth Circuit. There was no matter or circumstance before the Fifth Circuit that would require the Petitioners to respond to a judgment made by the Fifth Circuit in respect to the appeals. *Smith*, *Bohanan* and *Molinaro* cases.

The issues in the appeals that were before the Fifth Circuit were whether the District Courts wrongfully denied the Petitioners' applications to expunge from accusatory pleadings the descriptions of the Petitioners as unindicted, uncharged participants in a bribery scheme that violated the Foreign Corrupt Practices Act. The appeals from the District Court denials of the expungement applications were based upon the decisions in *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975); *In re Smith*, 656 F.2d 101 (5th Cir. 1981); *United States* v. *Chadwick*, 556 F.2d 450 (9th Cir. 1977) and the Department of Justice's policy statement in 9 UNITED STATES ATTORNEY'S MANUAL, Sec. 9-11.225. It was evident from the record that both the United States and the District Courts violated the Petitioners' Fifth and Sixth Amendment rights, and that it was these violations that were being appealed and these violations that needed to be remedied.

3. The dismissal of the Petitioners' appeals without an appropriate hearing as to the status of the Petitioners as fugitives ignored the ultimate facts and deprived the Petitioners of due process, liberty and property rights.

The facts on March 25, 1983, the date provisional extradition arrest warrants were issued for the Petitioners, were:

1. DeLeon had been living outside Mexico since January 8, 1983 and outside the United States since March 4, 1983.

2. Chavarria had been living outside Mexico and the United States since mid-summer 1982.

The Petitioners were not fugitives from justice at the time each of them left Mexico. The Petitioners were not fugitives from justice when each of them last entered the United States. The Petitioners were not fugitives from justice at the time each of them last left the United States. The Petitioners had no duty to be in the United States at the time the appeals were filed or to remain in the United States thereafter. The Petitioners had no

duty to be in the United States on March 9, 1983 (the alleged date of Mexican charge) or March 25, 1983 (extradition complaint date) or on any date thereafter. The Petitioners had left the United States prior to March 9, 1983. The Petitioners owed no duty to the United States, Mexico or any other government to remain in the United States. At the time of their respective departures from the United States the Petitioners were not charged with a crime in Mexico and were not the subject of an extradition complaint in the United States.

The Petitioners were not found in the United States. The Petitioners should not have been classified as fugitives from justice for purposes of the extradition proceeding.

In the *Molinaro* case, this Court described its position on the consideration of appeals of escaped prisoners in the following words:

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a *criminal case* after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims. (emphasis supplied).

Id. 396 U.S. at 365.

The applicability of the *Molinaro* rule to escapees, "bail jumpers" or persons taking unauthorized absence from the courts' jurisdiction is apparent. *United States* v. *Shelton*, 482 F.2d 848 (5th Cir. 1973); *Broadway* v. *City of Montgomery, Alabama*, 530 F.2d 657 (5th Cir. 1976), *United States* v. *U.S. Commanding Officer of the Provost Marshal, U.S. Army*, 496 F.2d 324 (1st Cir. 1974). The applicability of the *Molinaro* rule to civil appeals of matters that are intimately related to or intertwined with a conviction for a crime or escape from confinement has been established by the decisions in *Doyle* v. *United*

States Department of Justice, 494 F.Supp. 842 (D.C. D.C. 1980); *Conforte* v. *Commissioner*, ... U.S. ....., 103 S. Ct. 663 (1983). The limited holding of this Court in the *Molinaro* case and the fact that some courts had expanded the holding was acknowledged by Justice Rehnquist in the *Conforte* case.

> *While this Court has never extended the "fugitive from justice" rule* beyond the facts of Molinaro and Smith (i.e., *where the criminal conviction the litigant is a fugitive from is the judgment being challenged on appeal)*, the court below correctly points out that the Courts of Appeals have done so on a number of occasions. (emphasis supplied).

Id. 103 S.Ct. 663.

The genesis of the dismissal rule of the *Molinaro* case has been the proposition that a convicted appellant, by his voluntary act of removing himself from the jurisdiction of the Court, creates an unacceptable option solely within his own control; that is, the appellant acknowledges that he will subject himself to the Court's jurisdiction if the Court rules favorably on his appeal but will remain outside the Court's jurisdiction if the Court's ruling is unfavorable to him. In the case of an affirmance of the conviction the Court would be unable to enforce its judgment against the Appellant. In effect it is a *Hobson choice* that makes a mockery of the concept of an evenhanded administration of justice.

The Fifth Circuit's resolution of the question of the Petitioners' status as fugitives without a factual hearing deprived the Petitioners of:

A. Procedural due process in the form of a hearing relative to their status as fugitives;

B. The right to confront their accusers; that is, constables, U.S. Trial Attorneys, etc.;

C. A substantive consideration of the Petitioners' claim that their liberty and property rights had been violated by the actions of the United States in describing them

as unindicted/uncharged participants in a bribery scheme.

The dismissal of the Petitioners' appeals without an appropriate fact finding violated the Petitioners' rights under the Fifth and Sixth Amendments.

III

The equitable powers of the Courts of the United States to prevent abuse, oppression and injustice are adequate to fashion a protection for the Petitioners from the excesses of the United States and to protect the United States from the improprieties or defections of the Petitioners.

The cases appealed by the Petitioners to the Fifth Circuit were in fact and substance civil cases. The Petitioners had not been charged with the commission of any crime, yet, the United States engineered a strategy invoking a rule of criminal law, relying on a set of incomplete, inaccurate facts proffered by the United States to indicate wrongdoings by the Petitioners in order to deprive the Petitioners of their appeal rights.

At the time the accusatory pleadings were filed, the United States attorneys knew that an offense under the FCPA did not require proof of a completed bribe. The statements of the U.S. Trial Attorneys in May, 1983 indicated that they had not initially felt that they could prove a completed bribe and moreover were still unable to prove a bribe. Notwithstanding the foregoing state of facts, the United States went to great efforts to allege that the Petitioners accepted bribes and participated in a bribery scheme. The allegations of the United States have harmed the Petitioners' lives and destroyed their reputations in two countries. The United States did all of these things knowing that its allegations against the Petitioners were unessential to their case against the defendants in the FCPA case and knowing they had no evidence that any money or property was ever paid to Petitioners as a bribe.

The question is one of simple fairness: Is it fair that the United States and the various U.S. Trial Attorneys assigned to FCPA cases involved in the appeals be allowed to destroy two men's lives? Is it fair to let the United States intentionally violate a person's constitutional rights? Is it fair to allow the United States to insulate itself from the consequences of its own wrongs by judicial fiat? We think it is not.

At the time Chavarria left Mexico and the United States in mid-summer 1982 there was no inkling of the type of action the United States was going to take in respect to him. On November 17, 1982 the date the *Harvester* case was filed the full extent of the conscious excesses that the United States would and did take towards DeLeon and Chavarria was apparent.[2]

The record also shows the direct consequences of harm and irreconcilable inconsistencies that flowed from the actions of the United States.[3] Collectively the record chronicles the improprieties and the wrongdoings of the United States and brings into focus the question of this Court's ability to make clear to the United States and its attorney staff that: 1. In the first instance it

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[2] 76 surname identifications of the Petitioners appeared in accusatory pleadings in which the Petitioners were described but not indicted/charged as participants in an alleged bribery scheme; 22 job description identifications appeared in the same accusatory pleadings in which the Petitioners were described but not indicted/charged as participants in an alleged bribery scheme; 16 code word references were made to the Petitioners as "folks" who participated in an alleged bribery scheme without being indicted/charged with a crime in respect to such alleged participation.

[3] Over 3,000 newspaper, radio and television reports were made containing descriptions of the Petitioners as participants in an alleged bribery scheme; an order by a District Court judge expunging 37 surname identifications of DeLeon from the *Crawford* indictment and a subsequent order two days later by the same judge declining to expunge a job title description of DeLeon from the same indictment; an order by a District Court judge ordering the U.S. Trial Attorneys to delete from an Offer of Proof *job title* descriptions of the Petitioners and a second order refusing to expunge from an

is necessary that the United States and its professional trial staff understand and accept the fact that the Fifth and Sixth Amendments are alive, functioning and in a meaningful way protect the interests of the Petitioners and persons similarly situated. 2. Appellate courts of review cannot exercise jurisdiction not granted to them by statute and cannot extend or redefine a judicial rule of administration to fact situations and relationships that fall outside the principles contemplated by this Court in its supervisory role over the judicial process. The ultimate answer as to the outer limits of the *Molinaro* rule rests with this Court.

The fair and equitable administration of our judicial processes in these cases requires that the relative needs of the Petitioners and society be brought to a point of equipose. The Petitioners are convinced that the extension of the *Molinaro* rule to a point where their appeals are finally dismissed is inappropriate, but the Petitioners recognize that the outer boundaries of the rule can only be determined by this Court.

The Petitioners are equally concerned about the state of law whereby the United States and its representatives can consciously and intentionally violate the Petitioners' constitutional rights under the Fifth and Sixth Amendments and spare themselves the consequences of their acts by filing a Dismissal Motion based upon a provisional extradition warrant, which in no manner relates to the issues involved in the appeals, but which effectively defeats their constitutional rights by terminating a judicial review to ascertain whether their rights have been violated.

The gentlest description of the actions taken by the United States and its representatives in respect to the Petitioners in connection with the FCPA cases is "overzealousness"; the most

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information filed on the proceeding day the precise *job title* identifications of the Petitioners on the grounds that the Petitioners' application for injunctive relief came one day late, i.e., the information had been filed on the preceding day.

accurate description of the actions would be "conscious intentional attempts to violate the Petitioners' Fifth and Sixth Amendment rights and punish the Petitioners." Under the latter categorization of the actions of the United States, a reasonable application of the "clean hands" doctrine would have precluded the United States from urging its Dismissal Motion.

If it is clear that dismissal of the appeals was required, in an equitable context it is equally as important that the United States not be allowed to "get off Scot Free". In the event that the *Molinaro* rule governs the appeals the Petitioners suggest that the remedy that should be fashioned by this Court should meet the needs of the Petitioners, the Government and society as a whole and should be in the mold of this Court's definition of its equitable powers in the *Krippendorf* case, when it said "So the equitable power of courts of law over their own process to prevent abuse, oppression and injustice is inherent . . ." 110 U.S. at 283.

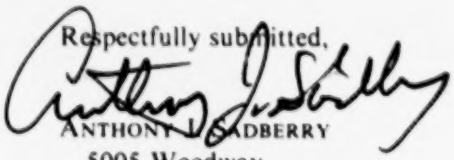
The Petitioners suggest that the proper equitable remedy would be the issuance by this Court of instructions to the Fifth Circuit in the following vein:

> The cases are remanded to the Fifth Circuit with instructions that the Fifth Circuit shall ascertain whether the Petitioners' constitutional rights were violated, and, if they were violated, the identifications of the Petitioners should not be expunged from the accusatory pleadings, but there shall be entered into the record in the respective cases a clear statement that the constitutional rights of the Petitioners were violated by the inclusion in the pleadings, of identifications of the Petitioners as participants in a bribery scheme and, stating that the identifications of the Petitioners were not expunged from the pleadings for the reason that the Petitioners were fugitives from provisional extradition arrest warrants.

The lack of jurisdiction by the Fifth Circuit to make the fugitive from justice determination that it did make, the inappropriateness of extending the *Molinaro* rule to the Petitioners' appeals, and the unwholesomeness of allowing the United States' violations of the Petitioners' constitutional rights to remain unredressed emphasize the need for and the soundness of having a writ of certiorari issue to review the order dismissing the Petitioners' appeals that was issued by the United States Court of Appeals for the Fifth Circuit on June 16, 1983.

DATED November 18, 1983.

Respectfully submitted,



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APPENDIX

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 83-2007, 83-2008
83-2045 & 83-2060

UNITED STATES OF AMERICA
Plaintiff-Appellee,

VERSUS

CRAWFORD ENTERPRISES, INC., *et al.*,
Defendants,

JESUS CHAVARRIA AND IGNACIO DELEON MARTINEZ,
Applicants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion for leave to file supplemental response to appellee's motion to dismiss is granted.

IT IS FURTHER ORDERED that the motion of appellee to dismiss the appeal is granted.

IT IS FURTHER ORDERED that appellants' motion to supplement the record on appeal is granted.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 83-2007, 83-2008,
83-2045 & 83-2060

UNITED STATES OF AMERICA
Plaintiff-Appellee,

VERSUS

CRAWFORD ENTERPRISES, INC., *et al.*,
Defendants,

JESUS CHAVARRIA AND IGNACIO DELEON MARTINEZ,
Applicants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 16, 5 Cir., 1983, ... F.2d . . . .).

(August 22, 1983)

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal; Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

. . . . . .

CHIEF JUDGE

U. S. CONST., art. III § 1 and 2.

Article III. *The Judiciary*

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

U. S. CONST., amend. V.

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION: DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. CONST., amend. VI.

AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. Section 1254(1):

SECTION 1254. COURT OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. Section 1291 (Supp. 1983):

SECTION 1291. FINAL DECISIONS OF DISTRICT COURTS

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title. As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.

28 U.S.C. 2101(c)

SUPREME COURT; TIME FOR APPEAL OR CERTIORARI; DOCKETING; STAY

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be

taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C. Section 2201:

SECTION 2201. CREATION OF REMEDY

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Title 9 of the United States Attorney's Manual.

"9-11.225 *Limitation on Naming Persons Unindicted Co-conspirators*

The practice of naming individuals as unindicted co-conspirators in an indictment charging a criminal conspiracy has been severly criticized in *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1974), and other cases. In granting appellants' motion for an order of expungement in *Briggs*, the Court of Appeals held that, in charging them with criminal conduct without indicting them, the grand jury exceeded its powers and authority and that its action was a denial of due process to appellants since it deprived them of an opportunity to challenge the correctness of the grand jury's accusation. See also *United States* v. *Chadwick*, 556 F.2d 450 (9th Cir. 1977); *Application of Jordan*, 439 F. Supp. 199 (S.D.W.Va. 1977); *United States* v. *Hansen*, 422 F. Supp. 430 (E.D. Wis. 1976).

"Primarily on the basis of *Briggs*, the American Bar Association has recently adopted as part of its policy on the

grand jury, the following statement of principle. "The grand jury shall not name a person in an indictment as an unindicted co-conspirator in a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars: (Principle 7 of 25 principles).

"The Department did not oppose the Adoption of this Principle by the ABA and generally concurs in it. As the court in *Briggs* pointed out, there is no need ordinarily to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty. For purposes of indictment itself, it is sufficient, for example, to allege that the defendant conspired with "another person or persons known." The identity of the person can be supplied, upon request, in a bill of particulars. With respect to the trial, the person's identity and status as a co-conspirator can be established, for evidentiary purposes, through the introduction of proof sufficient to invoke the co-conspirator hearsay exception without subjecting the person to the burden of a formal accusation by a grand jury.

"Accordingly, in the absence of some sound reason (e.g., where the fact of the person's conspiratorial involvement is a matter of public record or knowledge), it is not desirable for United States Attorneys to identify unindicted co-conspirators in conspiracy indictment."

FILED
DEC 28 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-848

IGNACIO DELEON MARTINEZ,
JESUS CHAVARRIA GARCIA,

Petitioners,

v.

UNITED STATES ATTORNEY GENERAL
WILLIAM FRENCH SMITH, ET AL.
UNITED STATES OF AMERICA

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF INVITING ATTENTION TO THE FIFTH CIRCUIT'S NOVEMBER 28, 1983 DECISION IN UNITED STATES V. INTERNATIONAL HARVESTER CO., ... F.2d 927

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The attention of the Court is respectfully invited to the fact that on November 28, 1983, the United States Court of Appeals for the Fifth Circuit entered its decision in *United States of America, Plaintiff-Appellee* v. *International Harvester Company, Defendant* v. *George S. McLean, Appellant*, ... F.2d 927, hereinafter referred to as the *McLean/Harvester* case, a copy of which decision is attached hereto as Appendix A. The *McLean/Harvester* case indirectly related to and impacted on the portion of the Petitioners' Petition for Writ of Certiorari involving Fifth Circuit Docket No. 83-2060, *Ignacio DeLeon Martinez and Jesus Chavarria, Applicants-Appellants; International Harvester Company, Defendant* v. *United States of America, Plaintiff-Appellee.*

In its decision in the *McLean/Harvester* case the Court of Appeals reaffirmed the base principle applicable to expungement cases arising within the Fifth Circuit as evidenced by its prior decisions in *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975); *In re Smith*, 656 F.2d 1011 (5th Cir. 1981), but held that the District Court's discretionary order denying expungement should be upheld for the reasons that:

1. The charges against McLean in the related *Crawford* indictment and the *Harvester* information were either identical or closely related, and that the *Crawford* case gave McLean "the opportunity to put the Government to its proof;"[1]

2. Neither McLean's arguments nor the record suggested that the naming of McLean in the *Harvester* case was for any advantage to the government or for any other purpose.[2]

McLean challenged the foregoing propositions in his Motion for Panel Reconsideration and Suggestion for En Banc Reconsideration.[3]

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[1] The Offer of Proof in the *McLean/Harvester* case:

(a) expanded the charges against McLean to include a charge that in the years 1977-1981 McLean falsely certified to Harvester that he had taken no action in violation of Harvester's anti-bribery policy; and stated that McLean did not hold a position that required him to report to Harvester management;

(b) stated that "there has been no evidence that any officers, directors or management of Harvester knew of or participated in the conspiracy charged in the information.

[2] McLean contends that:

(a) The government wanted a guilty plea from *Harvester* and *Harvester* wanted a $10,000 fine on a felony conspiracy charge rather than a $1,000,000 minimum fine under the Foreign Corrupt Practices Act ("FCPA").

(b) To obtain their mutual objectives the Government and Harvester reached an accommodation in which the Government falsely stated in the offer of proof in the *McLean/Harvester* case

The Petitioners believe that the decision of the Court of Appeals in the *McLean/Harvester* case indicates that absent the interjection of the "fugitive from justice" issue in the cases, the Court of Appeals would have ordered expungement of the references to the Petitioners from the cases pursuant to the rationale of the *Briggs* and *Smith* cases, *supra*.

The order of the Court of Appeals dismissing the Petitioners' appeals, which is the subject of the Petition for Writ of Certiorari, was entered without opinion. The decision in the *McLean/Harvester* case is relevant to the Second and Third issues set forth in the Petition for Writ of Certiorari filed by the Petitioners on November 21, 1983. The Court of Appeals' incorrect resolution of the "fugitive from justice" issue relates to the:

(a) Second issue before the Court, i.e., the denial to the Petitioners of the constitutionally protected right "to be free of government charges made with no opportunity to defend." *McLean/Harvester* case, Ex. A. p. 8.

(b) Third issue before the Court, i.e., the inequity and fundamental unfairness of allowing the government to denounce individuals as criminals and avoid responsibility

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that Harvester's management was unaware of the conspiracy involved in the alleged Pemex bribery scheme; and Harvester publicly proclaimed that its guilty plea was predicated on the doctrine of respondeat superior which precluded Harvester from urging a defense of lack of knowledge of its employees' violations of the FCPA.

(c) The government knew that *Harvester's* Vice President O. Morris Sievert, who was also President of Solar, was aware of all matters involving McLean's work and Solar's participation in the alleged conspiracy described in the Harvester information as evidenced by: (i) the Harvester table of management organization; and (ii) the Government's responses to McLean's Motion for a Bill of Particulars in the *Crawford* case, which responses were part of the record brought forward in the *McLean/Harvester* case and which **government responses stated that Harvester and Sievert were part of the alleged conspiracy to bribe Pemex personnel** (emphasis supplied).

for such unconstitutional actions by invoking out-of-context the rule of criminal law administration set forth in *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970).

The Fifth Circuit's imprecise caveats as to the absence of factors that would adversely affect its decision to affirm the trial court's discretionary denial of expungement coupled with its qualified references as to the wisdom of naming in an information individuals who had been indicted elsewhere as conspirators suggests a certain discontent with or uncertainty about the result reached in the *McLean/Harvester* case. In a narrow sense McLean's challenge to the Fifth Circuit's affirmation of the Trial Court's ruling in the *McLean/Harvester* case brought into issue questions as to the government's truthfulness and whether in good faith the government had sought to discharge its constitutional obligation not to violate McLean's rights. In a broad sense McLean's challenge reinforces the Petitioners' contention that in the alleged Pemex bribery scheme cases the government systematically and intentionally embraced a policy of denouncing individuals as criminals in violation of their constitutional rights as defined and established in the *Briggs* and *Smith* cases, *supra*. Such conduct by the government brings it within the ambit of this Court's rules as to the applicability of the "clean hands" doctrine and the duty of the courts to prevent "abuse, oppression and injustice" in the administration of justice, *Precision Investment Mfg. Co.* v. *Automatic Machine Co.*, 324 U.S.

806 (1945); *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240 (1933); *Krippendorf v. Hyde*, 110 U.S. 276 (1884).

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

INTERNATIONAL HARVESTER COMPANY,
Defendant,

v.

GEORGE S. MCLEAN,
Appellant.

NO. 83-2202
SUMMARY CALENDAR.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

NOV. 28, 1983.

Appeal was taken from an order of the United States District Court for the Southern District of Texas, Robert O'Conor, Jr., J., which refused expungement of any mention of appellant by name in an information and related documents which he was named but not charged as a coconspirator. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that district court did not abuse discretion in refusing expungement of any mention of appellant, who was indicted for conspiracy to engage in international bribery, by name in information and related documents in which he was named but not charged as a coconspirator where the charges in the indictment and charges in the information were carved from the same fact pattern and were identical or closely related.

Affirmed.

1. Criminal Law — 1226(3)

Appellate court reviews decisions on requests to expunge by abuse of discretion standard granting a range of latitute to district court.

2. Indictment and Information — 137(1)

District court did not abuse discretion in refusing expungement of any mention of appellant, who was indicted for conspiracy to engage in international bribery, by name in information and related documents in which he was named but not charged as a coconspirator in a conspiracy to engage in international bribery where the charges in the indictment and charges in the information were carved from the same fact pattern and were identical or closely related.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, TATE and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

George S. McLean appeals from an order refusing expungement of any mention of him by name in an information and related documents because he was named but not charged as a co-conspirator in the information. We are persuaded that the trial court did not abuse its discretion because the base principle of our expungement cases has not been violated, in that McLean can defend the charge in an earlier filed and related case in which he is a charged defendant.

McLean, with eight other individuals and a corporation, was indicted on October 22, 1982 for conspiracy to engage in international bribery. McLean was also charged with multiple counts of aiding and abetting substantive violations of that charge.

On November 17, 1982 all ten defendants named in the October indictment were named but not charged as co-conspirators with International Harvester Company in a criminal information. Both the indictment and the information charged conspiracy to engage in international bribery. International

Harvester waived indictment, pled guilty, and was sentenced the next day. In connection with the plea of International Harvester the government filed an offer of proof. McLean's motion to expunge his name from all the documents filed in connection with the information was denied and he appeals.

While we have not been explicit as to the jurisdictional source(s) here available, we have previously found appellate jurisdiction to review rulings on such requested expungement both under 28 U.S.C. § 1291, concerning appeals from orders possessed of requisite finality, and under the All Writs Act. *United States* v. *Briggs*, 514 F.2d 794, 808 (5th Cir. 1975); *In re Smith*, 656 F.2d 1101 (5th Cir. 1981).

[1] We review decisions on requests to expunge by an abuse of discretion standard granting a range of latitude to the district court. That deference is warranted by its greater familiarity with the local scene and the actuality of local public events.

In *Briggs* we recognized the right of named but uncharged co-conspirators to expungement of reference to them by name. We there rejected suggested barriers of jurisdictions, standing, and political thickets and found that a federal grand jury exceeds its power in naming persons but not charging them. The holding was footed on the constitutioinal right of a citizen to be free of government charges made with no opportunity to defend. The reasoning was applied in terms of grand jury power but its reach was wider. Six years later in *In re Smith*, 656 F.2d at 1106-07, we applied the same principle to require expungement of references to Smith by name in factual resumes prepared by an Assistant United States Attorney and used in the sentencing proceedings of others.

[2] It follows from *Briggs* and *Smith* that McLean would be entitled to his requested expungement from the information and related documents if we put aside the fact of his earlier indictment. But that fact is critical because the trial of the indictment provides McLean with the required opportunity to put the

government to its proof. The charges in the indictment and the charges in the information are carved from the same fact pattern and are either identical or closely related. Significantly, the indictment charging McLean and the information naming but not charging him were filed within thirty days of each other. The government's "charges" in the information were little more than a repetition of charges earlier levelled against McLean by a federal grand jury. In sum, the government is not making an accusation without the protection of trial.

There is no suggestion that the naming of McLean was for any advantage to the government. With ongoing investigations into complicated transactions, indictments and informations with substantial overlap are inevitable. Informations provide a practical tool for implementing plea bargains that accompany such investigations. Among other advantages, charges agreed to in plea negotiation can be quickly drawn without the expense and inconvenience of returning to the grand jury. The record suggests that nothing more occurred here. On these facts we are persuaded that the trial court did not abuse his discretion in refusing expungement.

We say only that there was no abuse of discretion. We do not say that naming conspirators elsewhere indicted in an information is a wise policy or always legal. Indeed we see little to justify such a practice and much to argue against it, including the generation of collateral appeals and the draining of resources best spent more productively.[1]

AFFIRMED.

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[1] McLean suggests error in various rulings made in the case in which he was indicted. We have no jurisdiction over those interlocutory orders and make no decision concerning them.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-848

IGNACIO DeLEON MARTINEZ,
JESUS CHAVARRIA GARCIA,

Petitioners,

v.

UNITED STATES ATTORNEY GENERAL
WILLIAM FRENCH SMITH, ET AL
UNITED STATES OF AMERICA

Respondents.

PETITIONERS' SECOND SUPPLEMENTAL BRIEF INVITING ATTENTION TO THE 1/24/84 ORDER IN UNITED STATES V. CRAWFORD ENTERPRISES, INC., CR. NO. H-82-224 (S.D. TEX.) and THE 1/24/84 ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE 10th CIRCUIT IN RESPECT TO THE OPINION IN UNITED STATES V. KILPATRICK, 570 F. SUPP. 505 (D. COLO. 1983).

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The issues presented by the two cases that are the subject of this supplemental brief relate to the Petitioners' third argument.

The Petitioners' third argument is that the Fifth Circuit's dismissal of the Petitioners' appeals under the rationale of *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970), violated the principles of the equitable and just disposition of issues mandated by *Krippendorf* v. *Hyde*, 110 U.S. 276 (1884) and *Precision Instrument Mfg. Co.* v. *Automatic Machine Co.*, 324 U.S. 806 (1945).

The Petitioners' appeals challenged the constitutionally impermissive description of the Petitioners in accusatory pleadings in criminal cases as unindicted/uncharged participants in a bribery scheme. The Petitioners' third argument raises the question whether the fair administration of justice contemplates allowing the United States as a transgressor to invoke a procedural rule to precipitate a dismissal of appeals challenging the Government's wrongdoings. If the issue is not addressed, the Government's constitutional violations will remain unredressed and unpunished.

The *Crawford* case[1] involves a January 24, 1984 exclusionary evidentiary order (Appendix p. 9). The order was sought by and granted to the defendants in the *Crawford* case, which is one of the criminal cases in which the Petitioners were described but not indicted or charged as participants in the alleged Pemex bribery scandal.[2] The appeal in the *Kilpatrick* case[3] involves the double standard of constitutional protection utilized by the United States in cases that fall within the ambit of *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975), i.e., it is wrong for the

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[1] *United States* v. *Crawford Enterprises, Inc. et al*, CR-No. H-82-224 (S.D. Tex.).

[2] Paragraph 25 of Count One of the 10/22/82 indictment in the *Crawford* case states:

> "25. It was further a part of the conspiracy that defendants CEI, CRAWFORD and HALL, assisted by Cemco, defendants EYSTER and SMITH for Ruston, defendants MCLEAN and URIARTE for Solar, and defendants GONZALEZ and GARCIA, would and did transmit and cause to be transmitted approximately $9,960,432.40 in bribe money to Grupo Delta and to defendant BELTRAN for payment to Chavarria and ." (Note: the blank space at the end of the quotation resulted from the clerk's expungement of 37 identifications of DeLeon from the Crawford indictment pursuant to Judge Cire's 10/27/82 order.)

[3] *United States* v. *Kilpatrick*, 570 F. Supp. 505 (D. Colo. 1983) *appeal docketed* (withdrawal or amendment of Memorandum Opinion) No. 83-2284 (10th Cir. 1983); (Jan. 3, 1984 temporary order delaying publication of Memorandum Opinion *vacated* on Jan. 24, 1984).

judge in the *Kilpatrick* case to issue a written opinion decrying the alleged professional misconduct of three Department of Justice Attorneys, but it is proper for the United States to describe individuals as unindicted participants in a bribery scheme.

I.

THE CRAWFORD CASE EXCLUSIONARY ORDER

Pursuant to the Exclusionary Motion[4] filed by the *Crawford* defendants, Judge Cire, on January 24, 1984 issued his order excluding evidence at the February 13, 1984 trial about alleged transfers of funds to Switzerland (Appendix p. 9). The Defendants in the *Crawford* case stated their position at page 10 of their brief in support of their Exclusionary Motion in the following words:

> "... After five years of investigation, and despite its use of a mass of grand jury material as bargaining chips, the government has struck bargains with the Swiss and Mexican governments that have not procured sufficient evidence to identify the sources of Grupo Delta funds or a shred of evidence which identifies the ultimate recipients of the funds in question. ..."

---

[4] The *Crawford* Defendants' Motion to Exclude evidence of alleged transfers of funds to Switzerland was bottomed on three propositions:

1) The Government didn't have proof that $9,960,432.40, or any part thereof, had been paid to the petitioners or transferred to Swiss Bank accounts controlled by the Petitioners;

2) The Defendants had withheld obtaining letters rogatory in respect to alleged bank transfers in detrimental reliance upon the Government's representation that the Government had requested the funds transfer data and the Defendants' request for the same data would jeopardize the prompt production of the data.

3) The Government now proposed to offer incomplete and misleading evidence that postulated a transfer of funds to a Swiss bank account, when the source of such funds could not be traced to Crawford Enterprises, Inc., and the identity of the ultimate depository of the alleged transferred funds was unknown.

The January 24, 1984 order confirms the Petitioners' contention that the United States had no proof[5] on October 22, 1982 (indictment date), or at later dates or finally on January 12,

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[5] Admissions by the United States in respect to its lack of proof of bribe payments to the Petitioners:

a) Paragraph 2 of the United States' 2/11/83 response to Defendants' bill of particulars in the *Crawford* case states:

> "2. The United States does not know the exact portion of each payment to Grupo Delta destined for Pemex officials, but can state the following:
>
> a. Between January, 1978 and the end of February, 1980, Grupo Delta received approximately $18,982,470.05 from CEI pursuant to various Pemex jobs, including not only those charged in the Indictment but also Jobs #163, 164, 165 and 213. Of this amount, $11,803,938 was payable to the "folks"
>
> b. The "folks" were defined by Crawford to Grupo Delta as including Ignacio DeLeon and Jesus Chavarria."

b) U.S. Trial Attorney Nicastro's comments in the 5/23/83 Hearing on Motions in the *Crawford* case Vol. 1, p. 156 were:

"Your honor, also we anticipate and we have some documents that we have acquired recently that we have not yet turned over that we will be able to offer proof of payment with respect to a certain amount of money going directly into an account controlled by one of the two Pemex officials listed in the indictment."

c) U.S. Trial Attorney Pendergast's statements in his December 21, 1983 affidavit in support of the 12/27/83 Motion by the United States for leave to take foreign deposition were:

> "b. Between January, 1978 and May, 1980 at least eighteen million dollars was forwarded via Crawford Enterprises, Inc. checks to Grupo Delta with at least ten million dollars of that money being earmarked as being for Chavarria and DeLeon. Through the cooperation of the Mexican Government, this money has been traced through numerous Mexican and United States bank accounts. Over five million dollars of this money has been traced to the Swiss Volksbank and to the Union Bank of Switzerland in Zurich, Switzerland."
>
> • • •
>
> "d. It is the Government's believe [sic] that these Swiss records will show that ownership of these bank accounts is in either the name of, or under the control of, Chavarria and DeLeon. This will complete the link of tracing funds between

1984 (motion date), that $9,960,432.40 in bribes had been paid to the Petitioners.

II.
THE GOVERNMENT'S DOUBLE STANDARD APPLICATION OF THE BRIGGS CASE RULE

Commencing on October 13, 1982 in informal discussions with Department of Justice lawyers, and at all times thereafter, the Petitioners have contended that it was and is improper for the United States to describe the Petitioners as un-indicted/uncharged participants in a bribery scheme. At the trial court level the Government resisted Petitioners' contentions on procedural and specious substantive grounds; at the appeals level the Government conceived and orchestrated or, at the very least, participated in an extradition strategem that enabled the *Briggs* rule to be by-passed.

On August 25, 1983 in the *Kilpatrick* case, the District Court issued a 20 page Memorandum Opinion granting a new trial to Mr. Kilpatrick. The opinion contained 17 pages of commentary about the professional conduct of three Department of Justice-Tax Division attorneys who had handled the Kilpatrick case.

The Government filed a motion to withdraw or amend the Memorandum Opinion on the grounds that because of a lack of a hearing on the merits the opinion posed a serious threat of unduly and irreparably injuring the professional reputations and careers of the three prosecutors. In the brief in support of their motion, the Government states that the Memorandum Opinion was violative of the rule of *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975). The District Court denied the Government's motion. The Government appealed the denial of the motion to the United States Court of Appeals for the Tenth Circuit and obtained a temporary order delaying the publication of the

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the defendants and the foreign officials whom they are accused of bribing."

Memorandum Opinion, which order was vacated by the Tenth Circuit on January 24, 1984 (Appendix p. 10-11).

The following points were made in the brief filed by the Government on 12/8/83:

> "Even an indictment, which is manifestly a document containing allegations rather than established facts, is recognized as a potentially damaging instrument. See, *e.g.*, *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975). By its nature as a document usually containing findings, an opinion by a court, even with caveats, has an even greater potential for harm."

Brief for Appellant at 16, *United Stated* v. *Kilpatrick*, No. 83-2284 (10th Cir. 1983).

> "It is plainly unfair to accuse individuals of wrongdoing where they have no forum to vindicate themselves. See *Briggs*, *supra*."

Brief at 19

> "In sum, without any need to do so, the District Court has effectively condemned professionals and potentially damaged their careers without a full hearing in which all of the evidence is presented. Such action is clearly inconsistent with notions of basic fairness."

Brief at 20

III.
OTHER MATTERS

The Court's attention is respectfully invited to the fact that George S. McLean, the appellant in *United States* v. *International Harvester Co.*, 720 F.2d 419 (5th Cir. 1983), has advised the Petitioners' attorney that he is preparing a Petition for Certiorari in respect to the adverse decision in the *Harvester* case, which opinion was the subject matter of the Petitioners' Supplemental Brief filed December 28, 1983. (Appendix p. 11)

CONCLUSION

The Petitioners' third argument deals with the constitutionally impermissive conduct of the United States and its representatives in guiding Houston Grand Jury 82-3 to the issuance of an indictment that violated the Petitioners' rights. Judge Cire's 1/24/84 order confirmed the Petitioners' factual contention that the indictment was constitutionally deficient and without basis for the contention that the Petitioners were the recipients of $9,960,340.40 in bribes.

The Government's withdrawal/amendment motion and brief in support thereof in the *Kilpatrick* case demonstrates the Government's adherence to a double standard of constitutional protection in *Briggs* type cases.

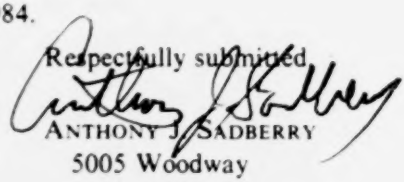
The United States Constitution, equity, and justice do not and cannot rest upon the proposition that the constitutional protection accorded United States attorneys can and should be of a higher degree than the constitutional protection accorded individuals who become enmeshed in a prosecutorial net woven and cast by the United States.

The Petitioners reiterate their contention that the dismissal of their appeals resulted from the incorrect application of the *Molinaro* rule. If the proper administration of the judicial process requires the classification of the Petitioners as fugitives from unperfected provisional extradition arrest warrants, an appropriate judicial remedy should be fashioned to let the record show the status of Petitioners both as fugitives from justice and

as individuals whose constitutional rights have been violated by the United States.

DATED January 30, 1984.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA

VS.

CRAWFORD ENTERPRISES, INC., ET AL.

Cr. No. H-82-224

ORDER

Following a hearing on January 18, 1984, and after considering the motions, the arguments of counsel, the record, and the law, the Court ORDERS:

1. Defendants Crawford Enterprises, Inc., Donald G. Crawford, and William E. Hall's *in limine* motion to exclude evidence relating to alleged transfer of funds to Switzerland is GRANTED. No evidence may be introduced concerning the transfer of funds to bank accounts in Switzerland.

2. The Government's motion for a continuance is DENIED.

3. Defendant Andres I. Garcia's motion to compel the production of the Government's response to his bill particulars is GRANTED. The Government shall produce its response by Tuesday, January 24, 1984, at 4:00 p.m.

SIGNED and ENTERED this 24th day of January, 1984.

GEORGE E. CIRE
UNITED STATES DISTRICT JUDGE

NOVEMBER TERM — JANUARY 24, 1984

Before Honorable William J. Holloway, Jr. and Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Luther L. Bohanon, Senior Judge, United States District Court.*

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v. No. 83-2284
WILLIAM A. KILPATRICK,
Defendant-Appellee.

On consideration of the Brief for the United States filed December 8, 1983, in support of the merits of the Government's appeal, the Government's emergency motion filed December 29, 1983, the letter response of the Bank of Nova Scotia stating that it has no objection to an order delaying publication of the opinion in question until resolution of this appeal, and the remaining responses and objections to the delay of publication of the opinion, we conclude as follows:

Based on the authorities relied on by the Government including, among others, *Lucas* v. *Central Missouri Trust Co.*, 162 S.W.2d 569, 590-91 (Mo. 1942) (en banc); *Nadeau* v. *Texas Co.*, 69 P.2d 586, 596 (Mont. 1937); and *Lowenschuss* v. *West Publishing Co.*, 542 F.2d 180, 183 (3rd Cir. 1976), it is arguable that there is some distinction between a restraint on all dissemination of an opinion and a direction to a publishing company, as the reporter of a court's decisions, to delay publication of the opinion. We must nevertheless consider fully the force of opinions broadly banning prior restraints. *E.g.*, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Near* v. *Minnesota*, 283 U.S. 697, 713-14 (1931). Considered in this light, we are

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* The Honorable Luther L. Bohanon of the United States District Courts for the Eastern, Northern and Western Districts of Oklahoma, sitting by designation.

not convinced that the Government has shown a justification for delay of publication of the opinion.

Accordingly the Government's emergency motion of December 29, 1983, is denied and the court's temporary order of January 3, 1984, is vacated.

HOWARD K. PHILLIPS
Clerk

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January 29, 1984

Mr. Charles J. Sullivan
5005 Woodway
Houston, Texas 77056

Subject: Deleon and Chavarria v. U.S. Att'y Gen'l, No. 83-848

Dear Charles,

I have reviewed your client's Petition for a Writ of Certiorari and the Supplemental Brief in the subject case.

There are many similarities in the government's misconduct and heavy handed administration of the judicial process in your clients case and the *Harvester* case wherein my Fifth and Sixth Amendment rights were violated.

I find unacceptable the Fifth Circuit's order affirming the District Court's order denying expungement. I further feel that the Fifth Circuit's opinion ... F.2d 927 is in error on several important points of law and that they simply ignored certain key facts concerning prosecutorial misconduct for some undisclosed reason.

I am in the process of preparing a Petition for a Writ of Certiorari which will be forwarded to the Supreme Court for docketing before February 27, 1984. (The Denials of my Petition for Rehearing and Suggestion for Rehearing En Banc were entered on December 29, 1983).

Thanks again for sending me a copy of your documents.

Best regards,

s/ GEORGE S. MCLEAN
George S. McLean

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CLERK

IN THE

Supreme Court of the United States

October Term, 1983

No. 83-848

IGNACIO DELEON MARTINEZ,
JESUS CHAVARRIA GARCIA,

Petitioners,

v.

UNITED STATES ATTORNEY GENERAL
WILLIAM FRENCH SMITH, ET AL
UNITED STATES OF AMERICA,

Respondents.

PETITIONERS' THIRD SUPPLEMENTAL BRIEF INVITING ATTENTION TO THE 3/1/84 ADMISSIONS BY THE UNITED STATES IN ITS APPEAL TO THE FIFTH CIRCUIT OF AN EXCLUSIONARY ORDER IN UNITED STATES V. CRAWFORD ENTERPRISES, INC. Cr. No. H-82-224 (S.D.Tex.)

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IN THE

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The Court's attention is invited to the admissions against interest in the United States' March 1, 1984 brief ("3/1/84 Brief") to the Fifth Circuit.[1] The admissions involve the Petitioners Third Argument (Petition pp. 19-23) and amplify the discussion of the *Crawford* case exclusionary order discussed in Petitioners Second Supplemental Brief at pages 2-4.

The United States failed to trace monies involved in the *Crawford* case to Swiss bank accounts which the United States believed were controlled by Ignacio DeLeon Martinez ("DeLeon") and Jesus Chavarria ("Chavarria"). The United

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[1] The Court's attention is also invited to the Petition for Writ of Certiorari filed by George McLean in *United States* v. *International Harvester Company*, 720 F.2d 418 (5th Cir. 1983). (See Petitioners' Supplemental Brief filed 12/28/83).

States indicated that it would seek to prove by circumstantial evidence that monies reached Switzerland. After considering certain defendants' motions in the *Crawford* case Judge Cire, on January 24, 1984, issued his order in the Crawford case denying to the United States the right to introduce evidence relating to the tracing of monies to Switzerland.[2] The United States appealed Judge Cire's exclusionary order to the Fifth Circuit and on March 1, 1984 filed its brief in support of its appeal.[3]

The United States stated in the *Crawford* Indictment and the *Harvester* Information that bribes had been paid to the Petitioners by two defendants in the *Crawford* case (Appendix A, p.1). The conflicting March 1, 1984 admissions by the United States are that:

1) There are no eyewitnesses to any delivery of funds to the Petitioners. (Appendix A, p.2).

2) $133,424.75 was traced to a bank account in the name of Proquimex S.A., a corporation owned by DeLeon which amount was the only direct proof of payment. (Appendix B, p.2).

3) All additional proof of payment of alleged bribes is circumstantial. (Appendix B, p.2).

4) A central hypothesis of the *Crawford* case and a disputed issue, is that the Pemex officials, DeLeon and Chavarria, were to receive bribe payments. (Appendix B, p. 4).

The Petitioners have previously pointed out that notwithstanding the allegations in the accusatory pleadings in the *Crawford* and *Harvester* cases about the payment of bribes to the Petitioners, the United States had no actual proof of payment of bribes to the Petitioners (Petition, p. 9; 2nd Supp. Brief, pp. 3, 4 — footnotes 1 and 2). The variance between the bribe allegations by the United States and actual fact is best understood by a review and comparision of the allegations in Appendix A with

---

[2] Petitioner's Second Supplemental Brief, p. 9.

[3] *United States* v. *Crawford Enterprises, Inc.*, Docket No. 84-2064 (5th Cir. 1984).

the admissions against interest and equivocations by the United States in the 3/1/84 Brief. (Appendix B).

THE BRIGGS RULE AND JUST DISPOSITION OF ISSUES

The United States' description of the Petitioners as participants in a bribery scheme and as recipients of bribes violated the Petitioners' rights under the Fifth and Sixth Amendments to the Constitution of the United States, as clearly stated in *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975); *In re Smith*, 656 F.2d 1101 (5th Cir. 1981).

The United States, in an attempt to salvage its position in the *Crawford* case, has now admitted that it has no direct or eyewitness proof of the payment of bribes to DeLeon and Chavarria, but appeals to the Fifth Circuit to be allowed to introduce circumstantial evidence which "tends to link", "tends to establish", is "consistent with the purpose and plan" that supports the United States' disputed "cential hypothesis" in the *Crawford* case, i.e. bribes were paid to the Petitioners.

The accusatory pleadings in the *Crawford* and *Harvester* cases and the 3/1/84 Brief were signed on behalf of the United States by the same U.S. Trial Attorney. The attorney's signature should constitute a certification by him that he had read the documents and that to the best of his knowledge and belief there were good grounds to support the positions taken in the accusatory pleadings and the brief.

It staggers one's imagination as to how the United States in 1982 can state that bribes had been paid to the Petitioners and in 1984 admit that there is no eyewitness or direct proof of the payment of bribes to the Petitioners.

The need for an equitable and just disposition of the issues surrounding the United States' violations of the Petitioners' constitutional rights, as mandated by *Krippendorf* v. *Hyde*, 110 U.S. 276 (1884) and *Precision Instrument Mfg. Co.* v. *Automatic Machine Co.*, 324 U.S. 806 (1945), is demonstrated by:

1) The 1982 bribe allegations by the United States and the 1983 and 1984 admissions that the United States had neither eyewitness nor direct proof that bribes were paid to the Petitioners; (Appendix A; Petition p. 9; 2nd Supp. Brief pp. 3, 4)

2) The Petitioners' unsuccessful 1982 administrative and judicial attempts to stop future and correct past bribery accusations against the Petitioners (Petition p. 6); and

3) The United States "double standard" for applying the *Briggs* rule as evidenced by the United States' argument in the *Kilpatrick* case coupled with the Solicitor General's decision, after obtaining two extensions, not to file a brief opposing this Court's review of the case. The declination supports an inference that the Solicitor General cannot reconcile or justify a double standard usage of the *Briggs* rule.

4) The absence of a procedure whereby the Petitioners can be relieved of the opprobrium resulting from the United States' bribery accusations.

This Court should take jurisdiction of this cause and speak to the issue as to when the espousal of legitimate prosecutorial interests ends and the invasion of a person's constitutional rights commences.

Respectfully Submitted,

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APPENDIX A

Allegations in accusatory pleadings by the United States in respect to Ignacio DeLeon Martinez and Jesus Chavarria.

1. Sections 19 and 25 of the *Crawford* Indictment state:

(19) It was a part of the conspiracy that defendant CEI and CRAWFORD would and did offer, agree to pay and pay to Chavarria and * bribes equalling approximately 4.5% of each Pemex purchase order for compression equipment systems in which defendant CEI participated.

(25) It was further a part of the conspiracy that defendants CEI, CRAWFORD and HALL, assisted by Cemco, defendants EYSTER and SMITH for Ruston, defendants MCLEAN and URIARTE for Solar, and defendants GONZALEZ and GARCIA, would and did transmit and cause to be transmitted approximately $9,960,432.40 in bribe money to Grupo Delta and to defendant BELTRAN for payment to Chavarria and * .

2. Sections 10 and 16 of the *Harvester* Information state:

10. It was a part of the conspiracy that CEI and its president, Donald G. Crawford would and did offer, agree to pay and pay to the Subdirectors of Purchasing and of Production bribes equalling approximately 4.5% of each Pemex purchase order for compression equipment systems in which CEI participated.

16. It was further a part of the conspiracy that CEI, with the knowledge of, among others, defendant SOLAR, through its officers, employees and agents, including McLean and Uriarte, would and did transmit and cause to be transmitted approximately $9,960,432.40 in bribe money to Grupo Delta for payment to the Subdirectors of Purchasing and of Production.

APPENDIX B

Extracts from the United States' 3/1/84 Brief in the Fifth Circuit in *United States of America* v. *Crawford Enterprises, Inc., et al*, Docket No. 84–2064, setting forth allegations by and admissions of the United States in respect to Ignacio DeLeon Martinez and Jesus Chavarria.

1. STATEMENT OF FACTS

1. The Scheme

The scheme charged in the indictment essentially involves a plan to pay Ignacio DeLeon . . . and Jesus Chavarria . . . approximately 5% of each purchase order awarded by Pemex to Crawford Enterprises, Inc. (CEI) or to the other coconspirator companies. The . . . counts in the indictment relate to 14 contracts totaling approximately $225 million obtained from Pemex by CEI, Ruston and Solar. These 14 contracts resulted in the planned payment of approximately $9.9 million in bribes to DeLeon and Chavarria. The $9.9 million in *bribe payments was disguised* in secret pricing computations on each contract *as money for the "folks,"* a code word meaning DeLeon and Chavarria, and *disguised as "commission" payments* sent from CEI to Grupo Delta, a Mexico City corporation. Grupo Delta represented itself as Crawford's agent, but *actually was the conduit for the bribe payments for DeLeon and Chavarria.* When Grupo Delta received funds from CEI, it kept only its share of the monies (two to three percent) and passed on the remaining portion representing bribe payments for the Pemex officials. Through an elaborate process of laundering transactions designed to conceal both the source and the recipient of the CEI monies, Grupo Delta fulfilled its role as conduit. In fact, Grupo Delta performed its task so well that *there are no eyewitnesses to any delivery of funds to DeLeon or Chavarria.*

The Government's evidence of the bribe scheme consists of the following:

1. Witnesses who *will testify* to the *establishment of the plan* to pay the 5% to DeLeon and Chavarria and

define the codeword "folks" as meaning DeLeon and Chavarria;

2. Pricing documents that will establish the bribe amounts included in each of the 14 contracts involved in the indictment;

3. Checks and other accounting records from CEI that will link the Grupo Delta payments to particular contracts;

4. Bank records that will trace each CEI check payable to Grupo Delta to an account in the name of Camarillo at Multibanco Comermex in Mexico City; and

5. Bank records of the Camarillo account will reflect disbursement of the monies in *a manner consistent with the plan* and corroborate the testimony as to *how the plan was to be implemented.*

CEI monies have been traced through Grupo Delta to checks payable to Swiss Volksbank in Zurich in eight separate instances. The negotiable instruments payable to Swiss Volksbank were each purchased by someone from Grupo Delta. On each occasion, the source of funds for these purchases was CEI. At no time did Grupo Delta receive sufficient funds from any other source to pay for these transfers . . . . (Emphasis supplied and footnote 2 omitted).

at pages 4, 5

• • •

The Excluded Evidence.

The trial court's January 24, 1984 ruling has excluded evidence proving eight transfers involving twelve negotiable instruments payable to Swiss Volksbank obtained through Grupo Delta with CEI monies. Other documentary evidence now barred includes . . . the Swiss court records regarding the objections of DeLeon and Chavarria to disclosure of the tracing of transactions involving the eight transfers.

Through careful analysis and tracing of the CEI payments, $133,424.75 has been traced directly to one of

DeLeon's* accounts in the United States . . . . *This is the only direct proof of payment. All available additional proof of payment is circumstantial.* These transfers total approximately $5.2 million, well over half of the $9.9 million *planned and intended* for Chavarria and DeLeon.

In the absence of direct evidence from eywitnesses or Swiss Volksbank, the question becomes what, if anything, links DeLeon and Chavarria to the monies transferred to Switzerland. (Emphasis supplied and footnote 3 omitted).

at pages 6, 7

• • •

On June 15, 1978, DeLeon wrote a check for $1,000 from his account in McAllen, Texas. On July 3, 1978, this check was date stamped at Swiss Volksbank. On the same date, Chavarria was in Zurich.

at page 8

• • •

SUMMARY OF ARGUMENT

. . . Therefore, it is evident that all relevant circumstantial evidence *tending to establish* the existence of the *bribe payments* is admissible.

The United States maintains that the documents reflecting each of the eight transfers of CEI funds from Grupo Delta to Swiss Volksbank are *admissible as circumstantial evidence* of the further implementation of the bribery scheme. *Whether the United States ever obtains the direct evidence,* i.e., the Swiss Volksbank records, has no bearing on the admissibility of these excluded items . . . The multiple launderings of bearer instruments before purchase of a bank draft payable to a foreign bank are clearly circumstantial evidence *tending to establish* that the disbursements were

---

* A schedule "Tracement of Grupo Delta Dispersements" (Document 308B-2) attached to the 3/1/84 Brief as Appendix p. 4 shows $133,424.75 being deposited in an account designated Proquimex S.A. (Ignacio DeLeon) and a schedule at page 5 contains a notation that Proquimex S.A. is owned by Ignacio DeLeon.

being handled in *a secretive and clandestine manner consistent with the purpose and plan of the bribery scheme.*

The Swiss police hotel records and charge account receipt records showing the presence of DeLeon and Chavarria in Zurich, (where Swiss Volksbank is located) on the same dates that negotiable instruments *intended* for them were negotiated, likewise connects the *intended recipients to the bribe monies* . . .

• • •

The objections to the release to the United States of the Swiss bank records showing the tracing and negotiation of these eight transfers, filed in July 1983 by DeLeon and Chavarria in Switzerland, *tends to connect DeLeon and Chavarria to the eight transfers being traced* . . . (emphasis supplied)

at pages 10, 11

• • •

II. The Excluded Circumstantial Evidence Was Relevant and Was Not Prejudicial

• • •

A. Relevancy

• • •

Certainly a *central hypothesis* of this case, and *a disputed issue*, is that the Pemex officials, DeLeon and Chavarria, were to receive bribe payments. . .

at pages 15, 16

These bearer instruments are not the only evidence linking the payments from CEI to the "folks" and to Swiss Volksbank. DeLeon's personal check dated June 15, 1978 payable to Swiss Volksbank is also proof *tending to link* DeLeon to Swiss Volksbank . . . It is documentary proof *tending to link DeLeon* to the bank. . .

Likewise, the Swiss police hotel records for DeLeon and Chavarria, and DeLeon's American Express records, establish the presence in Zurich, Switzerland of DeLeon and

> Chavarria, both together and separately, on certain crucial dates corresponding with the negotiation of DeLeon's check and the first two transfers from Grupo to Swiss Volksbank. Their presence at the time of these initial transfers is *significant. The presence of an intended bribe recipient* in a foreign city over 5,000 miles from home *when funds intended for him* are negotiated at a bank in the same foreign city is circumstantial proof *tending to link that bribe recipient,* in this case the Pemex official, *to receipt of the bribe funds from CEI* . . .
>
> Finally, Swiss court records, particularly the powers of attorney signed by DeLeon and Chavarria, indicate that DeLeon and Chavarria objected to our attempts to trace these eight transfers further. Their financial interest in the proceeds of these distributions, *which can be inferred from their objections to the release* of that information, *conclusively links* them to the bribe funds and *tends to establish the completion of the bribe payment* chain to the *intended* recipients. (Emphasis supplied)

at pages 17, 18

> The fact that the evidence on this issue *is circumstantial rather than direct* does not affect either its relevance or its admissibility.

at page 19

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No. 83-848

In the Supreme Court of the United States

OCTOBER TERM, 1983

IGNACIO DELEON MARTINEZ AND
JESUS CHAVARRIA GARCIA, PETITIONERS

v.

WILLIAM FRENCH SMITH,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed petitioners' appeals from district court orders denying their motions for expunction of their names and identifying characteristics from an indictment and related court documents.

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OPINION BELOW

The order of the court of appeals dismissing petitioners' appeals (Pet. App. 24) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24) was entered on June 16, 1983. A petition for rehearing was denied on August 22, 1983 (Pet. App. 25). The petition for a writ of certiorari was filed on November 21, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 20, 1982, a grand jury in the Southern District of Texas concluded deliberations on a proposed multi-count indictment charging that Crawford Enterprises, Inc., and nine individuals violated the Foreign Corrupt

Practices Act (FCPA), 15 U.S.C. 78dd-2. The indictment charged the defendants with violating the FCPA by using the instrumentalities of interstate commerce in furtherance of the payment of bribes —or the offer, promise, or authorization of payment of bribes — to officials of Petroleos Mexicanos (Pemex), the national oil company of Mexico, in exchange for favorable treatment in connection with proposed purchase orders.[1] Petitioners are Mexican citizens and former officials of Pemex. They were identified in the indictment as the foreign officials who were the recipients or intended recipients of the bribes, which allegedly totalled almost $10 million. DeLeon Martinez (hereinafter DeLeon) was described as the "subdirector of Pemex responsible for purchase of goods and equipment on behalf of Pemex," and Chavarria Garcia (hereinafter Chavarria) was described as the "subdirector of Pemex responsible for the exploration and production of Mexican oil and natural gas." Indictment para. 2. Petitioners, as the foreign targets of the bribery scheme, were not named as defendants in the indictment.

On October 21, 1982, DeLeon moved for injunctive relief to prohibit the grand jury from naming him in any indictment that it might return. Relying upon the Fifth Circuit's decisions in *In re Smith*, 656 F.2d 1101 (1981) and *United States* v. *Briggs*, 514 F.2d 794 (1975), he argued that it was improper for the grand jury to identify him by name in an indictment unless he was formally charged as a defendant. The district court granted a temporary restraining order and directed that any indictment identifying DeLeon be returned under seal unless he was charged as a defendant.

---

[1]Count 1 of the indictment also charged the defendants with conspiracy to violate the FCPA, in violation of 18 U.S.C. 371.

On October 22, 1982, the indictment described above was returned under seal. On October 27, the district court ordered that the indictment be unsealed, with the proviso that DeLeon's name be expunged from it. However, the district court denied DeLeon's subsequent motion to amend this order to require expunction of all references to his job title. The district court also denied Chavarria's motion to intervene in the proceeding for the purpose of obtaining expunction of references to his name. Petitioners then filed an appeal from those orders. Nos. 83-2007 and 83-2045 (5th Cir.).

In September 1982, Ruston Gas Turbines Inc., an alleged participant in the bribe scheme, entered a plea of guilty to one count of violating the FCPA, as charged in an information filed by the United States Attorney. On December 13, 1982, petitioners sought expunction of their names and identification of their official positions from the Ruston information. The district court denied relief, and petitioners again appealed. No. 83-2008 (5th Cir.).

On November 16, 1982, the United States Attorney filed an information in the United States District Court for the Southern District of Texas charging the International Harvester Company with conspiracy to violate the FCPA in connection with the same scheme. Again, petitioners sought expunction of their job titles from the information as well as from an offer of proof made in connection with the plea. The district court denied the application insofar as it related to references to their job titles in the information, but ordered that such references be stricken from the offer of proof. Again, petitioners filed an appeal. No. 83-2060 (5th Cir.). All of the appeals were consolidated for briefing and argument in the court of appeals.

2. Although petitioners were not named as defendants in the indictment and informations filed in district court in Texas, petitioners were formally charged by Mexican

authorities with conspiracy and fraud in violation of the Mexican Penal Code arising out of their alleged agreement to accept money from suppliers of Pemex in exchange for favorable treatment. Warrants for their arrest were issued by a Mexican court on March 9, 1983. Because petitioners were believed to be within the United States and residing in Sugarland, Texas, the United States was formally apprised of the charges through diplomatic channels, and a request was lodged by the Mexican Ambassador that they be arrested and held pending extradition to stand trial on the charges. An extradition complaint then was filed in the United States District Court for the Southern District of Texas on behalf of the Mexican government. Mot. to Dis. App. Exh. 1 (Apr. 28, 1983) (Extrad. Compl.).

The Extradition Complaint explained, on the basis of information received from Mexico through diplomatic channels, that Donald Crawford, the head of Crawford Enterprises,[2] controlled the bidding of various American suppliers involved in the bribery scheme and that Grupo Industrial Delta, a Mexican company ostensibly operating as the agent of Crawford Enterprises, was to be used as the conduit for the payments to Pemex officials. Extrad. Compl. para. 4. The Complaint further explained that the evidence to support these charges includes (*ibid.*):

> declarations of witnesses, including those who were principals of Grupo Industrial Delta; documentary evidence consisting both of records from Pemex and records of American companies involved in the activities described above; the results of an audit done of

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[2]Donald Crawford is one of the individual defendants named in the indictment described at pages 1-2, *supra*.

> Pemex documents; eyewitness examination by Mexican investigators of equipment and machinery purchased; and the results of prior investigations conducted by Mexican prosecutors of, among others, Ricardo Garcia Beltran (a principal of Grupo Delta) and Guillermo Jose Cervera Flores. The documents include Pemex files; invoices and checks to and from Pemex, the American companies involved and Grupo Delta; bank statements, signature cards, cancelled checks and other records showing transfers of money; and records of the various American companies involved which show that money was included in bids made to Pemex for various Pemex officials, including Ignacio DeLeon Martinez and Jesus Chavarria Garcia.

The Complaint further stated that petitioners had "fled outside the boundaries of Mexico" and were within the United States in Houston or its surrounding suburbs, and requested that warrants be issued for their arrest pursuant to 18 U.S.C. 3184 to initiate proceedings for their surrender to Mexico in accordance with the Treaty of Extradition, May 4, 1978, United States-Mexico, 31 U.S.T. 5061, T.I.A.S. No. 9656.

On March 25, 1983, the district court entered an order directing issuance of warrants for petitioners' arrest and confinement until their transfer to Mexico could be arranged (Mot. to Dis. App. Exhs. 2-4). However, when federal and local law enforcement personnel attempted to execute the warrants at residences owned by petitioners, they were not present. After further efforts to apprehend DeLeon and Chavarria within the United States proved unsuccessful, the government filed a Motion in the court of appeals on April 28, 1983, to dismiss petitioners' appeals from the district court's ruling on the expunction matters on the ground that petitioners were fugitives from justice. The government stated in its Motion (at 5) that Mexican authorities had informed the Justice Department attorney responsible for the Pemex bribery prosecution that they had been

unsuccessful in worldwide efforts to locate petitioners and that they were investigating reports that petitioners were hiding in Spain. In their response to the Motion, petitioners did not account for their whereabouts or deny that they had failed to surrender in accordance with the outstanding warrants. Instead, they argued, inter alia, that the government's assertions that they were fugitives were hearsay, that fugitive status in relation to the extradition warrants should not trigger dismissal of their appeals, and that the fugitive dismissal doctrine is inapplicable to civil appeals.

On June 16, 1983, the court of appeals issued an unpublished order dismissing the appeal (Pet. App. 24). Thereafter, petitioners filed a motion for reconsideration and a suggestion for rehearing en banc. In a "Supplement to Record" dated June 30, 1983, they submitted exhibits which they claimed established that, on the date the warrants were issued, they were not in the Southern District of Texas. DeLeon submitted a copy of a Mexican passport showing that he crossed the international boundary into Canada on March 4, 1983. Chavarria submitted an affidavit of his son, Estaban, stating that his father had not been in Houston, Texas, or resided at the house in Sugarland, Texas, since the middle of 1982. Again, however, neither petitioner attempted to account for his whereabouts or controverted the fact that he had not submitted to legal process in Mexico or the United States. In response, the government filed an affidavit of a local police officer stating that on March 8, 1983, he responded to a burglar alarm at DeLeon's home and that DeLeon was then residing there; and that the officer again saw DeLeon at the residence on the evening of March 24, the day before the warrants were issued. The government also filed a statement from the Attorney General of Mexico confirming that both petitioners were still fugitives with respect to the judicial proceedings that had been initiated in

Mexico (see Exh. 1-3). The petition for rehearing was subsequently denied (Pet. App. 25).

ARGUMENT

The decision of the court of appeals to dismiss petitioners' appeal is correct and does not conflict with any decision of this Court or another court of appeals. Nor does the unpublished order below dismissing the appeal in the particular circumstances of this case warrant further review for any other reason.

The legal arguments petitioners sought to present on their appeal are wholly without merit even without regard to their status as fugitives. It clearly was neither improper nor unconstitutional to identify them in the indictments, informations, and offer of proof filed in district court as the recipients or intended recipients of the bribes. But even if petitioners were correct on the merits of their claims, they have no right to litigate those questions now. They are Mexican citizens who are fugitives from the criminal justice system in their own country in connection with charges that are directly related to the FCPA charges in which they were identified in district court in Texas, and they apparently also have departed from this country and hidden themselves elsewhere to avoid detection. In these circumstances, they have no right to invoke the judicial processes of this Nation in a continuing effort to control the form of pleadings and offers of proof in criminal prosecutions brought by the United States. The way for petitioners to vindicate their reputations, if that is their goal, is to return home and stand trial in the courts of their own country. There is no reason to countenance their efforts to accomplish that end in collateral proceedings in the courts of the United States.

1. An essential element of the offenses with which the defendants were charged in district court under the FCPA is that there be a "foreign official" to whom a payment or an

offer, promise, or authorization of payment was made or directed. See 15 U.S.C. 78dd-2(a)(1), (a)(3) and (d)(2). Petitioners are the specific "foreign officials" who satisfy that essential element in this case, and it is beyond dispute that evidence could be introduced at trial to identify them as such. It scarcely can be improper to identify them in the indictment and informations as well.

The Fifth Circuit's prior decisions in *United States* v. *Briggs*, 514 F.2d 794 (1975), and *In re Smith*, 656 F.2d 1101 (1981), are wholly different in this critical respect. In *Briggs*, the court held that it was improper for the grand jury to name several persons, not charged as defendants in the indictment, as "unindicted co-conspirators" and that this naming of them should be expunged from the indictment. The court reasoned that the effect of the grand jury's action was for an impartial, quasi-judicial body formally to charge the persons with a crime without providing them with a forum in which to meet the charges, thereby abdicating what the court believed to be the grand jury's function to shield persons from baseless charges and impermissibly damaging their reputations in violation of the Due Process Clause. 514 F.2d at 800-806. In *In re Smith*, the Fifth Circuit reached a similar result in requiring the expunction from a summary of evidence submitted by the government in connection with a plea of guilty by a corporate defendant to a charge of bribing a purchasing agent of the Army and Air Force Exchange Service of references to payments made to one Smith, who was not involved in the specific count to which the corporation pleaded guilty. The court reasoned that the naming of Smith in a way that did not afford him an opportunity to vindicate his reputation violated his liberty and property rights guaranteed by the Due Process Clause. 656 F.2d at 1105-1107.

The force of the Fifth Circuit decisions upon which petitioners rely is signifcantly undermined by this Court's decision in *Paul* v. *Davis*, 424 U.S. 693 (1976), which was decided after *Briggs* and which was not even cited in *In re Smith*. In *Paul* v. *Davis*, the Court held that there is no constitutionally protected liberty interest implicated in governmental action imputing criminal behavior to an individual in the absence of some independent action taken against the individual — a factor also missing in *Briggs* and *In re Smith*. Moreover, whatever might be the validity of *Briggs* and *In re Smith* under some other rationale, such as the exercise by the Fifth Circuit of a supervisory power over grand juries or prosecutors, that rationale could not be extended to this case. Here, unlike in *Briggs* and *Smith*, petitioners were not named as "unindicted co-conspirators" in an arguably gratuitous fashion or identified, to no apparent purpose, with criminal activity unrelated to the offense with which the defendants in question were charged. To the contrary, the identification of petitioners as the foreign officials involved was integrally related to the very offenses with which the defendants were charged and, indeed, was an aspect of stating an essential element of those offenses.[3] The grand jury's actions therefore were in furtherance of the purposes of an indictment, recognized in *Briggs* itself (514 F.2d at 800), of giving notice to the defendant, pleading in the litigation, and furnishing the basis for determination of former acquittal or conviction. *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1876). And at least in the absence of countervailing foreign policy or national security concerns, the interest of the public in receiving information so

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[3]Section 9-11.225 of the U.S. Attorney's Manual (Feb. 5, 1979), cited by petitioners (Pet. 9, 16), also is limited to the naming of an unindicted co-conspirator and is not an absolute bar to the naming of such individuals (*U.S. Attorney's Man.*, Tit. 9 ch. 11, at 9).

central to the offense with which the defendants are charged also must be considered. Cf. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980).

This case also is quite different from *Briggs* and *In re Smith* in another respect that has been recognized by the Fifth Court itself. In a recent decision involving another alleged co-conspirator in the Crawford Enterprises/International Harvester case, the Fifth Circuit held that the principles of *Briggs* and *In re Smith* do not extend to named but unindicted co-conspirators who are subsequently charged in related criminal proceedings. See *United States* v. *McLean*, 720 F.2d 418 (5th Cir. 1983), discussed in petitioners' First Supplemental Memorandum filed in this Court.[4] In *McLean*, the court explained that "the fact of

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[4]In their Second Supplemental Memorandum (at 3-5, 7), petitioners contend that the district court's January 24, 1984 order in the *Crawford Enterprises* prosecution barring introduction of evidence concerning the transfer of money to Swiss bank accounts (Second Supp. Mem. App. 9) indicates that it was improper to identify them in the indictment. This contention is frivolous. The order excludes certain evidence; it does not and could not constitute a finding that petitioners had no involvement with the alleged bribery scheme. As the affidavit quoted by petitioner states (see Second Supp. Mem. 4 n.2), the prosecutor, through the cooperation of Mexican authorities, has traced money earmarked for petitioners through numerous bank accounts in Mexico and the United States, and $5 million has been traced to Swiss bank accounts that the government believes would be shown by bank records to be in the name of or under the control of petitioners. The basis of the motion of the *Crawford Enterprises* defendants to exclude the evidence pertaining to the Swiss accounts was that because the identity of the persons controlling the Swiss accounts has not been definitively established, the prejudicial impact of references to Swiss bank accounts outweighed the probative value of the evidence tracing the funds to those accounts. The government has noticed an appeal from the district court's granting of that motion. Moreover, there is reason to believe that the attorneys in Switzerland who are resisting the disclosure of records pertaining to ownership and control of the bank accounts are appearing on behalf of petitioners. Any such efforts by petitioners in the courts of Switzerland to frustrate the prosecution in Texas of course are beyond the control of United States courts, but the United States courts themselves need not be open to petitioners' efforts to censor the government's pleadings in the Texas prosecution.

[the alleged co-conspirator's] indictment * * * is critical because the trial of the indictment provides [the alleged co-conspirator] with the required opportunity to put the government to its proof." 720 F.2d at 420. For this reason, the court concluded that the co-conspirator was not entitled to expunction of his name from an information that did not formally charge him as a defendant, because "[t]he charges in the indictment and the charges in the information are carved from the same fact pattern and are either identical or closely related" (*ibid.*). Here, petitioners have been charged by Mexican authorities with offenses "carved from the same fact pattern" as the offenses alleged in the *Crawford Enterprises* indictment and the related informations from which they seek to have their names and identifying characteristics expunged, and they therefore likewise have been afforded "the protection of [a] trial" in which to meet the charges against them (*ibid.*). Petitioners, however, have refused to return to Mexico to avail themselves of that opportunity. Accordingly, petitioners' claims that their names and official positions should be expunged is without merit even under the Fifth Circuit's own precedent.

2. Aside from being wholly without substance, the nature of petitioners' claims on the merits also makes it clear that the court of appeals properly dismissed their appeals. Even if one assumes, notwithstanding *Paul* v. *Davis*, that petitioners would have some interest protected by the Due Process Clause in not being identified in the filings in district court if they were present in the United States, as Mexican citizens who are now (they say) residing outside the United States, they have no present claim to the protection of that Clause. *Shaughnessy* v. *Mezei*, 345 U.S. 206, 212 (1953). Similarly, even if it were to be assumed that petitioners had standing while present in the United States to invoke the Fifth Circuit's holdings in *Briggs* and *In re*

Smith to the extent those holdings rested on the court's supervisory power over the grand jury or the prosecutor, the court of appeals surely was not required to recognize a continuing right in petitioners to invoke the court's supervisory powers over the criminal process once petitioners had left the country. Thus, quite aside from petitioners' fugitive status, their presumably permanent departure from the United States was in itself a sufficient ground on which the court of appeals could conclude that their right to maintain the action had abated and that their appeals accordingly should be dismissed.

3. In any event, petitioners' status as fugitives conclusively "disentitles [them] to call upon the resources of the Court for determination of [their] claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970). Petitioners argue (Pet. 11-13, 16-18) that they should not be regarded as fugitives because they left the United States before the extradition warrants were issued on March 23, 1983, and left Mexico before they were formally charged there on March 9, 1983. There are several flaws in this argument.

First in their initial opposition to the government's motion to dismiss, petitioners did not make any factual submission to rebut the government's contention that they were in Sugarland, Texas, during the week of March 21, 1983, and that they were fugitives in relation to the extradition warrants issued in the Southern District of Texas. Only after the court of appeals dismissed their appeals did petitioners seek to supplement the record with a copy of DeLeon's passport allegedly showing that he had entered Canada from the United States on March 4, 1983, and an affidavit from Chavarria's son stating that Chavarria had not resided in the Sugarland house or visited the Houston area since mid-1972. The court of appeals was not required

to credit or give controlling weight to these belated submissions. Moreover, the fact that DeLeon entered Canada on March 4 does not establish that he remained there for three weeks, and indeed an affidavit of a local official subsequently filed by the government in the court of appeals stated that DeLeon in fact was in the Houston area on March 8 and 24, 1983. The affidavit of Chavarria's son regarding Chavarria's presence in Houston, even if credited, similarly does not support the broad assertion in the certiorari petition (Pet. 7) that he "has not been within the territorial boundaries of the United States or Mexico since mid-summer 1982."

But even if petitioners were correct that they left the United States prior to March 9 or March 25, 1983, the fact remains that they have been formally charged in Mexico[5] and related extradition warrants have been issued in Texas. Petitioners still have not surrendered in either jurisdiction to stand trial on the charges in Mexico, and they therefore are properly regarded as fugitives for purposes of the *Molinaro* doctrine. Cf. *Dawkins* v. *Mitchell*, 437 F.2d 646, 647-648 (D.C. Cir. 1970). The courts of the United States are not required to ignore that fugitive status merely because the criminal charges themselves were not filed against petitioners by the United States government, but by another sovereign (cf. *Broadway* v. *City of Montgomery*, 530 F.2d 657, 659 (5th Cir. 1976); *Fratus* v. *United States*,

---

[5]Although petitioners now object (Pet. 11-12) to the court of appeals' apparent reliance on the pending charges in Mexico, in their opposition to the government's Motion to Dismiss the Appeals (at 8-9) petitioners expressly admitted that such charges had been filed and that warrants had been issued by Mexican authorities for their arrest. Petitioners also fault the court of appeals for not ordering an evidentiary hearing on their fugitive status (Pet. 11-13), but it is not clear how a meaningful hearing could be held even on the factual issues they seek to raise unless petitioners were available to testify and be cross-examined regarding their whereabouts and the timing of their departures.

496 F.2d 1190 (5th Cir. 1974); *United States* v. *Shelton*, 482 F.2d 848 (5th Cir.), cert. denied, 414 U.S. 1075 (1973)), especially in light of the arrest warrants issued by a court of the United States as well. Principles of international comity also caution against resort to United States courts by petitioners in their effort to attack collaterally the charges that have been filed against them by the Mexican government.

Contrary to petitioners' contention (Pet. 15, 18), the *Molinaro* rule providing for dismissal of an appeal based on fugitive status is not rendered inapplicable simply because the instant proceedings are civil in nature (although they of course arise out of criminal cases). Indeed, petitioners concede (Pet. 17-18) that "[t]he applicability of the *Molinaro* rule to civil appeals of matters that are intimately related to or intertwined with a conviction for a crime or escape from confinement has been established" by the decisions in *Doyle* v. *United States Department of Justice*, 494 F. Supp. 842 (D.D.C. 1980), aff'd, 668 F.2d 1365 (D.C. Cir. 1981), cert. denied, 455 U.S. 1002 (1982), and *Conforte* v. *Commissioner*, 692 F.2d 587, 589-590 (9th Cir. 1982), application for stay denied, No. A-584 (Jan. 12, 1983) (Rehnquist, Circuit Justice). See also *Broadway* v. *City of Montgomery*, 530 F.2d at 659; *Dawkins* v. *Mitchell*, 437 F.2d at 648. The decision of the court of appeals in the instant case is consistent with these decisions, for the indictment, informations, and offer of proof from which petitioners seek to have their names and identifying characteristics expunged arise out of the same course of conduct as the outstanding Mexican charges from which they remain at large and therefore are, in petitioners' words, "intimately related to" those charges. Dismissal of petitioners' appeal therefore was an entirely proper course, especially given the nature of the claim they sought to raise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-848

IGNACIO DELEON MARTINEZ,
JESUS CHAVARRIA GARCIA,

Petitioners,

v.

UNITED STATES ATTORNEY GENERAL
WILLIAM FRENCH SMITH, ET AL.
UNITED STATES OF AMERICA,

Respondents.

PETITIONERS' BRIEF IN REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ISSUES

The United States' Brief in Opposition to the issuance of a Writ of Certiorari raises the following issues:

a) Do the Petitioners have constitutionally protected liberty or other interests within the meaning of *Paul* v. *Davis* 424 U.S. 693 (1976)?

b) If the United States knew that it had no eyewitness or direct proof of bribe payments to the Petitioners, can the United States describe the Petitioners as participants in a bribery scheme without violating the Petitioner's rights under the Fifth and Sixth amendments?

c) In order to have a constitutionally sufficient indictment or information charging an offense under the Foreign Corrupt Practices Court ("FCPA") does the indictment or information have to identify specifically the foreign official to whom a payment or an offer, promise, or authorization of payment was made or directed?

d) Can a defective extradition complaint constitute the basis for the dismissal of a civil case under the Rule of *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970)?

e) Does Mexico's charge of the Petitioners on March 9, 1983 justify describing the Petitioners' in accusatory pleadings filed on September 20, September 23, October 22 and November 17, 1982 in the *Miller*, *Ruston*, *Crawford* and *Harvester* cases as participants in a bribery scheme and the recipients of $9,960,432.40 in bribes?

ARGUMENT

1. The Petitioners as citizens of Mexico have constitutionally protected liberty and property rights within the meaning of *Paul* v. *Davis*, 424 U.S. 693 (1973).

The Petitioners as aliens are entitled to the due process and trial protections of the Constitution. Neither the Fifth nor Sixth Amendments to the Constitution limit their coverage to citizens of the United States. In the *Briggs* and *Smith* cases the Court recognized the existence of liberty and property rights that were protected by the Fifth and Sixth Amendments and found that such rights were violated when individuals were described but not charged as participants in crimes.

In addition to the personal humiliation, dishonor and injury to their reputations for integrity the Petitioners suffered the loss of their Pemex pensions and loss of opportunities for consulting jobs in the fields in which they have spent their working lives.

Judge Cire found harm and damage to DeLeon as the result of the inclusion of his name in the *Crawford* Indictment. Judge Cire's ruling in the Crawford case should have been equally applicable to Chavarria. Judge Cire however, refused to expunge the references to Chavarria.

At pages 16 and 17 of the Petition the Petitioners accurately described the circumstances under which they departed from Mexico, entered the United States and thereafter left the United

States. It is clear that DeLeon, a Mexican citizen, was spending most of his time in the United States, in the fall of 1982 and was entitled to and did invoke the protection of the United States, at the time the accusatory pleadings in respect to him were filed in 1982, at the time the appeal notice was filed and at the time the appeal was perfected.

It is equally clear that under the "No person shall be . . . " concept of the Fifth Amendment and the "accused shall enjoy . . . " concept of the Sixth Amendment, Chavarria was entitled to expect that the United States would not and should not institute actions against or in respect to him that violated the Fifth and Sixth Amendments. The availability of those constitutional guarantees to Chavarria in his individual estate or role did not and should not hinge upon his residence in the United States, Mexico or elsewhere. If the United States takes actions which violate Chavarria's rights, he should be able to challenge such actions. It is also axiomatic that the United States has the absolute power to institute any and all actions against Chavarria that fall within the purview of the Fifth and Sixth Amendments.

The United States has stated no facts that justify its unconstitutional attacks on the Petitioners.

2. The absence of eyewitness and direct proof of the payment of bribes to the Petitioners entitled the Petitioners' to the constitutional guarantees contemplated by the Briggs and Smith cases.

The admissions by the United States, as set forth in Appendix B of the Petitioners' third Supplemental Brief, rebut the allegations of the United States about the payment of bribes to the Petitioners. Whether the United States can prove that the defendants in the *Crawford* case entered into a conspiracy to attempt to bribe the Petitioners will have to await the outcome of a trial on another day. The fact is that in 1982 and today the United States has no proof that the Petitioners were bribed.

3. The FCPA was intended to criminalize the payment of bribes to foreign officials, but it did not change the Constitution nor create a right or an obligation to identify specifically individuals who are not charged with a crime.

In its argument before Judge Bue who initially heard DeLeon's injunction motion and later before Judge Cire, the United States urged that DeLeon should be identified with specificity in order to comply with the requirement of the FCPA. The United States stated that DeLeon "was a central figure in the alleged criminal scheme and an essential element of the charges in the indictment" whose name and position should be disclosed, because his position was central to the alleged crime. Judge Bue required that any indictment naming but not charging DeLeon be sealed and delivered to the judge in whose court the *Crawford* indictment was lodged for final consideration and decision as to whether DeLeon's motion for an injunction barring the use of his name should be granted.

At the hearing on DeLeon's injunction motion, evidence was introduced as to the large number (over 3,000) of adverse newspaper, radio and television reports that had been made about DeLeon and Chavarria and the fact that DeLeon's Pemex pension had been discontinued because of the allegations that had been made against him in September, 1982 in the *Miller* and *Ruston* cases.

Judge Cire entered the following order:

> "Plaintiff DeLeon has suffered humiliation, embarrassment, and damage to his reputation from his name having been in Federal indictments issued in the investigation concerning the Foreign Corrupt Practices Act violations. The harm was shown through Mexican newspaper articles introduced into evidence.
>
> Plaintiff in the future will continue to suffer harm similar to that suffered in the past if the Government continues to use his name in the indictment in Criminal No. H-82-224. Therefore, Plaintiff will suffer irreparable harm.

> It is not necessary that Plaintiff's name appear in the indictment in Criminal No. H-82-224, and the Government will not be harmed if his name is not in the indictment. *See United States* v. *Briggs*, 514 F.2d 794, 805 (5th Cir. 1975). *See also In re Smith*, 656 F.2d 1101 (5th Cir. 1981).
>
> Therefore, it is ORDERED that Plaintiff's motion for preliminary injunction is GRANTED";

Judge Cire subsequently denied DeLeon's motion to expunge his job description from the *Crawford* Indictment and his name and job description from the accusatory pleadings in the *Ruston* case.

Judge O'Connor ordered expungement of job descriptions of the Petitioners from the *Harvester* Offer of Proof, at 10:00 A.M. November 18, 1982 but at the same time denied expungement of job descriptions of the Petitioners from the *Harvester* Information filed at 3:00 P.M. on November 17, 1982 on the grounds that the Petitioners were too late.

4. A defective extradition complaint supported by arguably incompetent evidence should not have been considered and acted upon without a hearing and cannot form the basis for the dismissal of a civil case under the rule of *Molinaro* v. *New Jersey* 396 U.S. 365 (1970).

The extradition complaint that formed the basis for the Fifth Circuit's dismissal of the Petitioners' appeal was defective and was relied upon without an appropriate evidentiary hearing to evaluate the questionable actions of constables in Fort Bend County, Texas, which actions were offered by the the United States in support of its claims under the extradition complaint. The facts are:

a. The March 25, 1983 extradition complaint furnished to the Fifth Circuit stated that a diplomatic request for the extradition of the Petitioners would be made in conformity with the Treaty of Extradition between the United States of America and Mexico, TIAS 9656 ("Treaty") and the formal

papers upon which the demand for extradition was founded would be presented within 60 days as required by Article 11 of said treaty. The foregoing documentation was not provided by Mexico.

Under applicable law the foregoing documentation was necessary to establish that the Petitioners were extraditable pursuant to the specific terms of the Treaty. The documentation was required to be in the possession of the United States by May 24, 1983. The documentation had not been filed in United States Clerk's office by August 29, 1983. To the present knowledge of Petitioner's counsel the documentation still has not been filed in the extradition proceeding.

Without a properly documented extradition complaint the Fifth Circuit did not have a basis to determine whether the Petitioners were fugitives from justice, i.e. the extradition complaint became inoperative by the Treaty's terms when it was not documented by May 24, 1983. The extradition complaint did not constitute competent evidence of the Petitioners' status on June 16, 1983 (date of original order) or August 22, 1983 (date rehearing denied). There is nothing in the official records of the Fifth Circuit or the District Court that shows that an offense has been committed under Mexican law, that an arrest warrant has been issued, or that a crime was committed in Mexico that justified extradition under the treaty except the extradition complaint which has not been documented.

b. The United States submitted to the Fifth Circuit an affidavit of Constable Morgan ("Morgan") of Fort Bend County, Texas. Morgan allegedly saw DeLeon on March 8, 1983. Morgan later advised Petitioner's counsel that he had not initially recalled seeing DeLeon on March 8, 1983 but after his recollection was refreshed when he looked at some records in the office of the Homeowner's Association for the Sugar Creek subdivision where DeLeon's home was located,

he recalled seeing DeLeon. Morgan stated that the Association's records were in the possession of Chief Hughes. When Petitioners' counsel requested Chief Hughes to make the Association's records available to the Petitioners attorney for examination to verify Morgan's statement, Chief Hughes refused to do so until he could get permission from U.S. Trial Attorney Pendergast, and such permission was never obtained even though Chief Hughes knew that the records were required by and important to the Petitioners in presenting their appeal before the Fifth Circuit.

5. Mexico's charging of the Petitioners with crimes on March 9, 1983 does not validate the United States unconstitutional actions in describing the Petitioners in accusatory pleadings in the *Miller, Ruston, Crawford* and *Harvester* cases as participants in a bribery scheme and the recipients of $9,960,432.40 in bribes.

The Petitioners' rights were violated by the United States in United States judicial proceedings in the fall of 1982. The violation was not eliminated or cured by the filing of undocumented and still unproved charges against the Petitioners in Mexico in 1983.

Notwithstanding the Fifth Circuit's statement in *United States* v. *International Harvester Company* 720 F. 2d 419 (5th Cir. 1983) the dismissal of the charges against the Petitioners or the determination in lower or appellate courts of Mexico that the Petitioners are not guilty of the charges made against them in Mexico will have no effect upon the allegations of criminal conduct made against the Petitioners in the *Miller, Ruston, Crawford* and *Harvester* cases. The Fifth Circuit did not provide the legal alchemy which would enable proceedings in Mexico to eradicate the violations of the petitioners' rights in the United States.

The United States invocation of the *Briggs* rule in its Brief to the Tenth Circuit in the *Kilpatrick* case indicates clearly the

United States representatives know or should know that the argument that a trial in Mexico will not cure the United States' violations of the Petitioners' constitutional rights and has no basis in the Treaty, comity or justice.

Conclusion

The Fifth Circuit lacked jurisdiction under 28 U.S.C. § 1291 to determine the disputed question of whether the Petitioners were fugitives from justice. Mexico's failure to perfect the extradition complaint placed the Fifth Circuit in the position of not having before it competent evidence showing the Petitioners to be a fugitive from justice. The record shows that the Petitioners liberty and property interests were violated when the United States described but did not charge them as being participants in a bribery scheme that violated the FCPA. The injuries flowing from the United States' improper actions cannot and will not be undone by actions that occur in Mexico.

Respectfully Submitted,

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